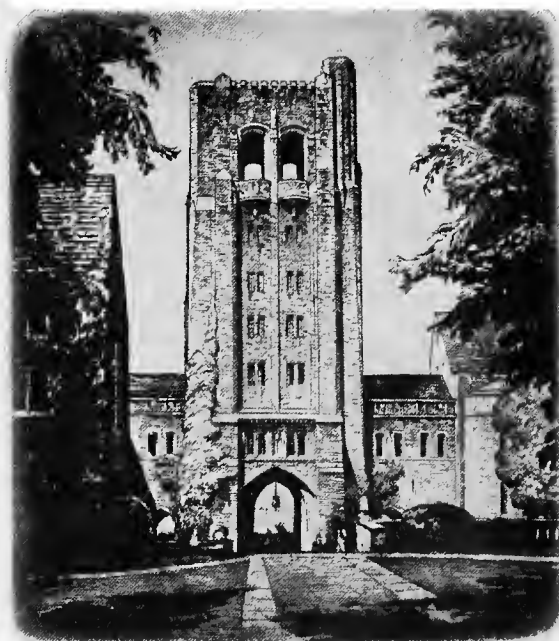


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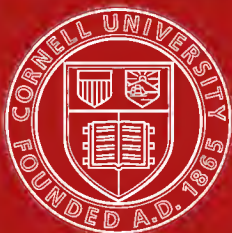
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A TREATISE

ON THE

LAW OF DOMESTIC RELATIONS

By *23land*
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Professor of Law in Washington and Lee University

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PREFACE

This book has been written to supply a need which I have personally felt as a teacher of law. In writing it I have kept my own students constantly in mind, and have endeavored to set forth those principles of the law which I thought they ought to know, in such a manner as to be most readily grasped by them. In all cases my aim has been to present and emphasize principles, rather than the details of their application, such details being supplied only so far as seemed desirable for purposes of illustration. In the apportionment of space among the several branches of the subject, I have acted according to my best judgment as to the relative importance to the student of each topic in the present state of the law; in some instances devoting to a particular topic more, and in others less, space, relatively, than is done in other works written specially for the practitioner.

The citation of authorities, while abundant, is, of course, far from exhaustive. Care has been taken, however, to furnish a starting point in all cases from which the reader may readily find additional authorities upon any given point.

Although this book is intended primarily for the use of students, it is hoped that it may be not wholly without value to the practitioner as well.

J. R. L.

Lexington, Virginia.

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DOMESTIC RELATIONS.

INTRODUCTION.

§ 1. The domestic relations defined and enumerated.

The domestic relations are the relations existing between the members of a family or household. According to the usual classification, these relations are four in number, namely, the relations of (1) husband and wife; (2) parent and child; (3) guardian and ward; (4) master and servant. The relation of master and servant as a purely domestic relation is now of small importance, and the law relating thereto will be found discussed in connection with other branches of the law, especially the law of contracts, agency, and torts. No discussion of this relation will therefore be attempted in this work. The other three relations will now be considered in order, after which the nearly related subject of infancy will be discussed.

PART I.

HUSBAND AND WIFE.

§ 2. In general.

The relation of husband and wife (*baron* and *feme*) is perhaps the most important of the domestic relations,

Long, D. R.—1.

and constitutes one of the chief foundations of our social order.¹ We shall investigate in detail the nature of marriage; the essentials of a valid marriage; how marriage is effected; the legal consequences of marriage, or the rights, duties, and liabilities growing out of the marriage relation; and, finally, the dissolution of marriage, including a full discussion of the law of divorce and separation.

¹ The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. Story, *Confl. Laws*, § 109, quoting Fergusson, *Mar. & Div.* 397.

CHAPTER I.

THE NATURE OF MARRIAGE.

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- 4. Marriage not a Contract, but a Status.
- 5. Marriage a Public Relation.
- 6. Marriage a Permanent Relation.
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§ 3. Definition of marriage.

The word marriage is used in two senses. It may mean either the solemnity or ceremony by which a man and a woman are joined in wedlock, or their status when they have been so joined.²

Marriage in the first sense will be considered later. An eminent authority has defined marriage in the second sense as follows: "Marriage, as distinguished from the agreement to marry, and from the act of becoming married, is the civil status of one man and one woman legally united for life, with the rights and duties which, for the establishment of families and the multiplication and education of the species, are, or from time to time may thereafter be, assigned by the law to matrimony."³ More briefly, marriage is the civil status of a man and a woman legally united as husband and wife.

² Harvey v. Farnie, 6 Prob. Div. 35.

³ 1 Bishop, Mar., Div. & Sep. § 11. "The word 'marriage' signifies, in the first instance, that act by which a man and woman unite for life, with the intent to discharge towards society and one another

In a number of states marriage is defined or described by statute. The statutes, however, are merely declaratory, wholly or in part, of the common-law definition of marriage.⁴

In the Catholic countries, and in some of the Protestant countries, of Europe, marriage is treated as a sacrament;⁵ but in England and in this country it is re-

those duties which result from the relation of husband and wife. The act of union having been once accomplished, the word comes afterwards to denote the relation itself." Schouler, Dom. Rel. § 12. See, also, *State v. Bittick*, 103 Mo. 183, 23 Am. St. Rep. 869.

⁴ Thus, in California it is provided that "marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making that contract is necessary." Civ. Code, § 55; *Kilburn v. Kilburn*, 89 Cal. 46, 23 Am. St. Rep. 447. And in Missouri it is declared that "marriage is considered in law as a civil contract, to which the consent of the parties capable in law of contracting is essential." Rev. St. 1889, § 6840. But while here declared to be a civil contract, it is something more than an ordinary contract,—marriage is a status, created by contract. *State v. Bittick*, 103 Mo. 183, 23 Am. St. Rep. 869. So, also, in New York, "marriage, so far as its validity in law is concerned, shall continue in this state a civil contract, to which the consent of parties, capable in law of contracting, shall be essential." Rev. St. (9th Ed.) p. 1889, § 1. This statute declares marriage to be a civil contract, as distinguished from a religious sacrament, and makes the element of consent necessary to its legal validity; but its nature, attributes, and distinguishing features it does not interfere with or attempt to define. It is declared a civil contract for certain purposes, but it is not thereby made synonymous with the word "contract," employed in the common law or statutes. *Wade v. Kalbfleisch*, 58 N. Y. 282, 17 Am. Rep. 250. So, also, in Nebraska. *University of Michigan v. McGuckin*, 62 Neb. 489, 87 N. W. 180, 57 L. R. A. 917.

⁵ Story, Conf. Laws, § 108. "It would seem that in the dark ages a notion prevailed of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character. * * * In more modern times it has been considered in its proper light,—as a civil contract, as well as a religious vow." *Fornhill v. Murray*, 1 Bland (Md.) 479, 18 Am. Dec. 344. See, also, *Londonderry v. Chester*, 2 N. H. 268, 9 Am. Dec. 61.

garded wholly as a civil institution, without any necessary religious character.⁶

§ 4. Marriage not a contract, but a status.

Marriage was formerly regarded as a contract. Thus Blackstone says: "Our law considers marriage in no other light than as a civil contract."⁷ This view is held by some modern authorities, who, however, recognize that, if a contract, it is a contract of a peculiar character, and subject to peculiar principles.⁸ The better view, however, is that marriage is not a contract at all, but a status. It is, indeed, founded on contract,⁹ but marriage itself, in the sense in which we are now using

⁶ 1 Bl. Comm. 433. See, generally, cases cited in notes to sections immediately following.

⁷ 1 Bl. Comm. 433. It is probable that, in speaking of marriage as a civil contract, Blackstone intended merely to distinguish it from a religious sacrament, in which light it was regarded by the ecclesiastics. He goes on to say: "The holiness of the matrimonial state is left entirely to the ecclesiastical law," thus clearly recognizing that marriage is a status. This remark applies, also, to the statutes defining marriage as a civil contract. See *Wade v. Kalbfleisch*, 58 N. Y. 282, 17 Am. Rep. 250.

⁸ See *Townsend v. Griffin*, 4 Har. (Del.) 440; *Maguire v. Maguire*, 7 Dana (Ky.) 181; *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92.

⁹ "Whatever question or controversy may exist among legal writers and jurists concerning the nature of the relation subsisting between husband and wife after marriage, * * * all the authorities concur in the conclusion that marriage has its origin and foundation in a purely civil contract." *Bigelow, J.*, in *Little v. Little*, 13 Gray (Mass.) 264. The marriage relation is, in fact, based on two contracts, namely, the contract to marry, or the "engagement," and the contract of marriage, by which the parties assume the marital status. The contract of marriage is, of course, the execution or performance of the contract to marry. See post, §§ 9, 29-32.

the term, is not a contract.¹⁰ This becomes plain when we note some of the particulars in which marriage differs from an ordinary contract. Thus, as has been well said: "That marriage executed is not a contract we know, because the parties cannot mutually dissolve it, because the act of God incapacitating one to discharge its duties will not release it, because there is no accepted performance that will end it, because a minor of marriageable age can no more recede from it than an adult, because it is not dissolved by a failure of the original consideration, because no suit for damages will lie for the nonfulfillment of its duties, because its duties are not derived from its terms, but from the law, because legislation may annul it at pleasure, and because none of its other elements are those of contract, but all are of status."¹¹ In considering marriage as a status, rather

¹⁰ *Hyde v. Hyde*, L. R. 1 Prob. Div. 130; *Randall v. Kreiger*, 23 Wall. (U. S.) 137; *Maynard v. Hill*, 125 U. S. 190, *Woodruff*, Cas. 23; *Gregory v. Gregory*, 78 Me. 187, 57 Am. Rep. 792; *University of Michigan v. McGuckin*, 62 Neb. 489, 87 N. W. 180, 57 L. R. A. 917; *Wade v. Kalbfleisch*, 58 N. Y. 282, 17 Am. Rep. 250; *McKinney v. Clarke*, 2 Swan (Tenn.) 321, 58 Am. Dec. 59; *Hilton v. Roylance*, 25 Utah, 129, 69 Pac. 660, 95 Am. St. Rep. 821, 58 L. R. A. 723; *State v. Duket*, 90 Wis. 272, 48 Am. St. Rep. 928, 31 L. R. A. 515. It is well settled that marriage is not a contract within the meaning of the clause of the federal constitution which prohibits the impairment by a state of the obligation of contracts. *Maynard v. Hill*, 125 U. S. 205, *Woodruff*, Cas. 23; *State v. Tutty*, 41 Fed. 753, 7 L. R. A. 50; *Townsend v. Griffin*, 4 Har. (Del.) 440; *Adams v. Palmer*, 51 Me. 480; *Magee v. Young*, 40 Miss. 164, 90 Am. Dec. 322; *State v. Duket*, 90 Wis. 272, 48 Am. St. Rep. 928, 31 L. R. A. 515.

¹¹ 1 Bishop, Mar., Div. & Sep. § 13. The quotation here made from Mr. Bishop is reviewed and disapproved in *McCreery v. Davis*, 44 S. C. 195, 51 Am. St. Rep. 794, 28 L. R. A. 655, and the conclusion reached that, in South Carolina, marriage is a civil contract. But the doctrine of the text is now almost universally accepted. Thus,

than a contract, however, we should be careful to bear in mind that we are here concerned only with marriage in the second sense, as above defined, namely, "marriage, as distinguished from the agreement to marry, and from the act of becoming married." The agreement to marry may very properly be designated as the contract to marry, and the act of becoming married as the contract of marriage. And where, as is frequently the case, marriage is spoken of as a civil contract, it will usually be found that the court is concerned with marriage in one or the other of these senses.¹²

§ 5. Marriage a public relation.

Marriage is not merely a personal relation between the husband and wife, but is a status established by law,

in *Randall v. Kreiger*, 23 Wall. (U. S.) 137, it is said: "Marriage is an institution founded upon mutual consent. That consent is a contract, but it is one *sui generis*. Its peculiarities are very marked. It supersedes all other contracts between the parties, and with certain exceptions it is inconsistent with the power to make any new ones. It may be entered into by persons under the age of lawful majority. It can be neither canceled nor altered at the will of the parties upon any new consideration. The public will and policy controls their will. An entire failure of the power to fulfill by one of the parties, as in case of permanent insanity, does not release the other from the pre-existing obligation. In view of the law it is still as binding as if the parties were as they were when the marriage was entered into. Perhaps the only element of a contract, in the ordinary acceptance of the term, that exists, is that the consent of the parties is necessary to create the relation." See, also, *McKinney v. Clarke*, 2 Swan (Tenn.) 321, 58 Am. Dec. 59.

¹² Thus, in *Hulett v. Carey*, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419, 34 L. R. A. 384, the court says: "The law views marriage as being merely a civil contract, not differing from any other contract, except that it is not revocable or dissoluble at the will of the parties." See, also, *Meister v. Moore*, 96 U. S. 76, *Woodruff, Cas.*

involving not only the well-being of the parties, but also the highest interests of society and the state. It partakes of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community. And the power of the legislature over marriage as a status is supreme and unlimited, in the absence of some constitutional restriction.¹³ It follows that there are, in effect, three parties to every marriage,—the man, the woman, and the state.¹⁴ The man and the woman may determine whether or not they will marry, and, unless prevented by statute, may fix the form of marriage ceremony. They may also, by a contract made before marriage, settle their respective property rights; but after the relation has been voluntarily assumed by them, the law fixes its character and the rights, duties, and obligations incident to it. These may be changed by the legislature, but cannot be determined or modified in any way by the husband and wife. They may marry or not, as they choose, but, having chosen to marry, they must do so on the terms imposed by the state.

For convenience we shall hereafter, except when otherwise indicated, use the term “parties” to mean simply the husband and wife.

23; *Barkshire v. State*, 7 Ind. 389, 65 Am. Dec. 738; *Holmes v. Holmes*, 6 La. 463, 26 Am. Dec. 482; *Fornhill v. Murray*, 1 Bland (Md.) 479, 18 Am. Dec. 344; *Phillips v. Gregg*, 10 Watts (Pa.) 158, 36 Am. Dec. 158.

¹³ *Maynard v. Hill*, 125 U. S. 190, Woodruff, Cas. 23; *Wade v. Kalbfleisch*, 58 N. Y. 282, 17 Am. Rep. 250; *Magee v. Young*, 40 Miss. 164, 90 Am. Dec. 322; *State v. Duket*, 90 Wis. 272, 63 N. W. 83, 48 Am. St. Rep. 928, 31 L. R. A. 515.

¹⁴ The state is a third party to every contract of marriage, and

§ 6. Marriage a permanent relation.

Except so far as its dissolution is provided for by law, marriage is a permanent relation. In this respect it differs materially from some of the other personal relations, such as that of principal and agent, master and servant, guardian and ward. These relations may exist for a time, and be dissolved at will by the parties. Not so with marriage. It is a union for life. A temporary cohabitation, although accompanied by the usual incidents of the marital state, is not marriage.¹⁵

§ 7. Marriage an exclusive relation.

Although plural marriages are recognized as valid in some countries, marriage, among all enlightened nations, is an exclusive relation; that is to say, it is the "voluntary union for life of one man and one woman, to the exclusion of all others."¹⁶ It follows that a man or woman who already has one wife or husband cannot lawfully take another.¹⁷

has a direct interest therein. *Trammell v. Vaughan*, 158 Mo. 214, 59 S. W. 79, 81 Am. St. Rep. 302.

¹⁵ See *Letters v. Cady*, 10 Cal. 533; *Peck v. Peck*, 155 Mass. 479, 30 N. E. 74. Marriage is the union of one man and one woman "so long as they both shall live," to the exclusion of all others, by an obligation which, during that time, the parties cannot, of their own volition and act, dissolve, but which can be dissolved only by authority of the state. *Roche v. Washington*, 19 Ind. 53, 81 Am. Dec. 376. In this case it was held that an Indian marriage, dissoluble at will, was not a valid marriage. But see, contra, *Johnson v. Johnson*, 30 Mo. 72, 77 Am. Dec. 598, in which it was held that permanency is not an essential element of marriage by the "law of nature." See, also, 1 Bishop, Mar., Div. & Sep. §§ 306-308.

¹⁶ *Hyde v. Hyde*, 1 Prob. Div. 130; *In re Bethell*, 38 Ch. Div. 220.

¹⁷ See post, § 15.

CHAPTER II.

THE ESSENTIALS OF A VALID MARRIAGE.

I. IN GENERAL—CONSENT.

- § 8. Void and Voidable Marriages Distinguished.
- 9. Marriage Founded on Consent.
- 10. Consent must be to Marriage.

II. CAPACITY OF PARTIES—IMPEDIMENTS TO MARRIAGE.

- § 11. In General.
- 12. Precontract.
- 13. Consanguinity and Affinity.
- 14. Impotency.
- 15. Prior Marriage Undissolved.
- 16. Want of Age.
- 17. Want of Consent of Parent or Guardian.
- 18. Want of Reason.
- 19. Impediments of Race or Social Condition.
- 20. Impediments Following Divorce.

III. REALITY OF CONSENT.

- § 21. In General.
- 22. Marriage under Duress.
- 23. Marriage Procured by Fraud—In General.
- 24. Same—Whether Void or Voidable.
- 25. Same—Consummated and Nonconsummated Marriages Distinguished.
- 26. Same—Liability for Fraudulently Procuring Marriage.
- 27. Marriage Entered into by Mistake.

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- § 28. In General.
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- 30. Marriage at Common Law.

31. Same—Marriage per Verba de Presenti.
32. Same—Marriage per Verba de Futuro cum Copula.
33. Formal Marriage—Statutory Provisions.
34. Same—The Celebrant.
35. Marriage Ceremony without Matrimonial Intent.
36. Motives Inducing Marriage Immaterial.
37. Curative Statutes.
38. Estoppel to Deny Marriage.

I. IN GENERAL—CONSENT.

§ 8. Void and voidable marriages distinguished.

Before considering the essentials of a valid marriage, the distinction between void and voidable marriages should be noted. A marriage is void when it is a mere nullity. Its invalidity may be maintained in any court, in any proceeding, between any parties, whether the question arise directly or collaterally, and whether the parties to the supposed marriage be living or dead. A marriage is voidable when it is affected with some imperfection for which it may be set aside in a direct proceeding instituted for that purpose during the lifetime of both of the parties, it being deemed valid for all purposes unless and until so set aside. When once set aside, it is rendered void from the beginning.¹

The origin of this distinction seems to have been as follows: Formerly marriage was governed by two different systems of law, administered respectively by the

¹ 1 Bl. Comm. 434; Schouler, Dom. Rel. § 14; 1 Bishop, Mar., Div. & Sep. §§ 258, 259; Elliott v. Gurr, 2 Phillim. Ecc. 16; Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105; Stevenson v. Gray, 17 B. Mon. (Ky.) 193; Fornshill v. Murray, 1 Bland (Md.) 479, 18 Am. Dec. 344; Harrison v. State, 22 Md. 468, 85 Am. Dec. 658; Gathings v. Williams, 27 N. C. (5 Ired.) 487, 44 Am. Dec. 49; Williams v. Williams, 63 Wis. 58, 23 N. W. 110, 53 Am. Rep. 253.

temporal and the spiritual courts. Under each system, certain marriages were condemned as invalid for reasons growing out of the respective views taken by the two classes of courts as to the nature of marriage. The common-law courts, looking upon marriage merely as a civil contract, held that whatever would invalidate a contract would, in general, invalidate a marriage. The ecclesiastical courts, on the other hand, regarding marriage as a sacrament, determined its validity according to its character as holy or sinful from a religious standpoint. A person might be competent at common law to contract marriage, and yet a particular marriage entered into by him might be invalid according to the ecclesiastical law because sinful. Thus, an unmarried adult of sound mind was competent, by the common law, to marry, but by the ecclesiastical law he would not be permitted to marry, his own sister. Marriages deemed sinful by the ecclesiastical law might be set aside for the safety of the souls of the parties by a suit in a spiritual court; but until so annulled, they were recognized as valid by both the ecclesiastical and the common law. If, now, the validity of a marriage was questioned before a common-law court on a common-law ground, the court could pronounce the marriage void, if the objection urged were established, for in such case it would be applying its own law. But the common-law court was presumed to have no knowledge of ecclesiastical law, and hence could not determine the validity of a marriage assailed on a canonical ground, but could only pronounce the marriage valid, subject to avoidance by the spiritual courts. Thus it was that a court of common

law would hold that a marriage was void or voidable according to the character of the invalidating objection as civil or canonical. It should be added that the court would, by prohibition, prevent a spiritual court from annulling a marriage after the death of either of the parties, for the judgment could not then tend to their reformation.²

The distinction here noted, although important, is frequently overlooked by judges and legislators, and the terms "void" and "voidable" are often used interchangeably.

§ 9. Marriage founded on consent.

The fundamental principle with reference to which the validity of an alleged marriage is to be tested is that marriage is founded on the voluntary consent of the

² 1 Bl. Comm. 434, 435; 1 Bishop, Mar., Div. & Sep. §§ 260-268. In *Gathings v. Williams*, 27 N. C. (5 Ired.) 487, 44 Am. Dec. 49, Ruffin, C. J., said: "There is a distinction in the law between void and voidable marriages where, even, they were regularly solemnized. The latter, which are sometimes called 'marriages de facto,' are such as are contracted between persons who have capacity to contract marriage, but are forbidden by law from contracting it with each other, as to which, therefore, there was a jurisdiction in the spiritual courts to declare the nullity of the marriage. But until the nullity was thus declared, as an existing marriage, it was recognized as valid both in the canon and common law; and, as there can be no proceeding in the ecclesiastical court against the parties after their death, or that of one of them, that event virtually makes the marriage good ab initio to all intents, and the wife and husband may have dower and curtesy, and the issue will be legitimate. Co. Litt. 32, 33. But where the marriage is between persons, one of whom has no capacity to contract marriage at all, as where there is a want of age or understanding, or a prior marriage still subsisting, the marriage is void absolutely and from the beginning, and may be inquired of in any court. For although, in such case, there

parties.³ If such consent appear, the marriage is valid; without it, the marriage is invalid. All three parties must give their consent. The consent of the state, as a party to every marriage, may ordinarily be presumed, and the law fixes the terms upon which that consent is granted. By accepting these terms, i. e., consenting thereto, in a form recognized by law, the man and woman become husband and wife. But to have this effect the consent must be a legal consent, that is, (1) it must be to a marriage, as defined by law, and not to some special arrangement of the parties; (2) the parties must be competent to consent; (3) the consent must be voluntary; (4) the consent must be expressed in some form which the law will recognize. These several elements of a legal consent require particular examination.

§ 10. Consent must be to marriage.

To render the parties husband and wife, that to which they consent must be the relation which the law regards as marriage; an agreement to assume some other relation, not constituting marriage, will not have that

may be a proceeding in the ecclesiastical court, it is not to dissolve the marriage, but merely, for the convenience of the parties, to find the fact and declare the marriage thereupon to have been void ab initio, and no civil rights can be acquired under such a marriage. It is said to be no marriage, but a profanation of marriage, and the factum is a nullity."

³ Holmes v. Holmes, 6 La. 463, 26 Am. Dec. 482; True v. Ranney, 21 N. H. 52, 53 Am. Dec. 164; Hilton v. Roylance, 25 Utah, 129, 69 Pac. 660, 95 Am. St. Rep. 821, 58 L. R. A. 723. And see, generally, cases cited throughout this chapter. The essence of the contract of marriage is the consent of the parties, as in the case of any other contract. Hulett v. Casey, 66 Minn. 327, 61 Am. St. Rep. 419.

effect. We have already seen that the character of the marital relation is fixed by law, and cannot be changed by the parties. If the relation which they voluntarily assume constitutes a marriage in contemplation of law, the parties are married, although they may not have intended such a result. On the other hand, if this relation does not constitute a legal marriage, the parties are not married, although they may have intended to become married, and may consider and call themselves husband and wife. Thus, a man already married to one woman may go through the marriage ceremony with another woman, and afterwards cohabit with her as his wife, both parties intending marriage, but they are nevertheless not married, for a polygamous relation is not a legal marriage.⁴ Again, an agreement to cohabit temporarily as man and wife does not constitute marriage, for marriage is a permanent relation.⁵

But if the agreement is to assume substantially the relation of husband and wife, the parties will be adjudged such, notwithstanding some collateral stipulation by which they undertake to modify or limit the scope of marriage as defined by law. Such a stipulation is void, or mere surplusage. Thus, an agreement by the man, before marriage, that he will not live with the woman after the marriage, is void, and does not

⁴ See post, § 16.

⁵ *Letters v. Cady*, 10 Cal. 533. Thus, a written contract to enter into a "copartnership on the basis of the true marriage relation, * * * [and] to continue this copartnership so long as mutual affection shall exist," is not a marriage, though followed by cohabitation. *Peck v. Peck*, 155 Mass. 479, 30 N. E. 74. See, also, *Randall's Case*, 5 City H. Rec. (N. Y.) 141.

affect the validity of the marriage.⁶ So, also, a marriage according to the rites of the Mormon church, by which the parties are "sealed for time and eternity," is good; that part of the contract and ceremony which relates to eternity being regarded as mere surplusage.⁷

It may be a matter of difficulty at times to determine whether the variation introduced by the parties goes to the essence of the marital relation as defined by law, and therefore defeats the marriage, or constitutes a non-essential variation, which may be disregarded. But in any case the rule to be applied is plain. If the agreement is to assume essentially the marital relation, the parties are married, and any terms affecting the relation, not authorized by law, are void; but if an essential element of a legal marriage be lacking, there is no marriage, although all the other elements of that relation may be present.⁸

II. CAPACITY OF PARTIES—IMPEDIMENTS TO MARRIAGE.

§ 11. In general.

There can, of course, be no valid marriage unless the parties are competent to give their consent. They must

⁶ Brooke v. Brooke, 60 Md. 524; Franklin v. Franklin, 154 Mass. 515; 26 Am. St. Rep. 266. In both these cases the stipulation was followed by a regular marriage ceremony in due form. See, also, Barnett v. Kimmell, 35 Pa. 13. It seems clear that any preliminary agreement inconsistent with marriage is of no effect where a marriage is afterwards solemnized in good faith. Hills v. State, 61 Neb. 589, 85 N. W. 836, 57 L. R. A. 155.

⁷ Hilton v. Roylance, 25 Utah, 129, 69 Pac. 660, 58 L. R. A. 723. In this case, however, the court stated that if the "sealing" was for eternity only, there would be no valid marriage.

⁸ See 1 Bishop, Mar., Div. & Sep. §§ 300-304. For a curious case, see State v. Walker, 36 Kan. 297, 59 Am. Rep. 556.

be "two persons of the opposite sexes, without disqualification of blood or condition, both mentally competent and physically fit to discharge the duties of the relation, neither of them being bound by a previous nuptial tie."^{8a} As has already been stated, the disabilities to contract marriage were divided by the English law into two classes: (1) Canonical impediments,—so called because they were derived from the canon law. They were cognizable by the ecclesiastical courts, which formerly had jurisdiction of matrimonial causes. These impediments rendered the marriage voidable merely, and not void. (2) Civil or legal disabilities. These were the disabilities created or enforced by the municipal laws, and were cognizable by the temporal courts. They rendered the marriage void.⁹ The distinction is of no practical importance in this country. The canonical impediments are (a) precontract; (b) consanguinity or affinity; (c) incurable impotency. The legal impediments are (a) prior marriage; (b) want of age; (c) want of consent of parent or guardian; (d) want of reason. To these may be added (e) impediments of race or social condition; and (f) impediments following divorce.

In all of the states, statutes have been passed declaring who shall and who shall not be competent to marry, and pronouncing marriages contracted by incompetent persons invalid. The statutes vary slightly as to what constitutes a disability, and also as to its effect upon

^{8a} Schouler, Dom. Rel. § 15.

⁹ Ante, § 8; 1 Bl. Comm. 434; Sneed v. Ewing, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41.

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the marriage. The original distinction between the canonical and civil disabilities is disregarded, and the statutes determine what marriage shall be void and voidable, respectively. In many cases, also, they declare a particular marriage void only from the time of decree, thus introducing a new degree of invalidity, a marriage so dissolved being strictly neither void nor voidable, in the original sense, but corresponding exactly to a valid marriage which has been dissolved by divorce.

We shall now consider the several impediments and disabilities in detail.

§ 12. Precontract.

This impediment, rendering a marriage voidable merely, existed where one of the parties was under a prior agreement to marry a third person, or had already married a third person, but not according to the prescribed forms. It is unknown in America, and the law on the subject is obsolete.¹⁰

§ 13. Consanguinity and affinity.

Consanguinity is relationship by blood; affinity is relationship by marriage. Marriage between persons nearly related in either way is deemed incestuous, and is prohibited by law. Such marriages, especially between persons very nearly related, have always been regarded with peculiar abhorrence by all enlightened peoples, though the prohibited degrees of relationship are not always the same. In England the intermarriage of near relatives was forbidden by the ecclesiastical

¹⁰ 1 Bl. Comm. 434, 435; 1 Bishop, Mar., Div. & Sep. § 280.

law, which in this particular was based upon the Levitical law as found in the eighteenth chapter of Leviticus. The ecclesiastical law, however, included in its prohibition persons competent to marry by the Levitical law, and by degrees the prohibition was extended beyond all reasonable bounds. This abuse was corrected by statutes passed in the reign of Henry VIII., and later, so that at present only persons nearer related than first cousins are prohibited from marrying in England.¹¹ The subject is regulated in all the states by statutes which define the prohibited degrees. In several states the intermarriage of first cousins is prohibited, but generally the prohibition does not extend so far.¹² The prohibi-

¹¹ 1 Bl. Comm. 434; Schouler, Dom. Rel. § 16; 1 Bishop, Mar., Div. & Sep. § 730 et seq.; *Butler v. Gastrill*, Gibb. 156. The opinion in this case contains an extensive discussion of the subject. "The church extended the impediments to marriage further than was pleasing to the civil power. Consanguinity and affinity, even to the seventh degree of the canonical reckoning, which might include the fourteenth degree of the civil law, were made obstructions to the nuptials. * * * And an affinity nearly equivalent to consanguinity was also created by commerce without marriage, so that a person guilty of fornication could not marry one related to the particeps criminis within a certain part of the prohibited degrees. These impediments seemed not the less burdensome though, as an offset, they were often made the means of dissolving uncongenial marriages, indissoluble by the general ecclesiastical law. Persons within the prohibited degrees might be permitted to marry, on cause shown, by special dispensations from the head of the church." 1 Bishop, Mar., Div. & Sep. § 262.

¹² See 1 Stimson, Am. St. Law, § 6111. In England, a man cannot marry his deceased wife's sister. *Brook v. Brook*, 9 H. L. Cas. 193; *Ex parte Naden*, 9 Ch. App. 670. And this was formerly the law in Virginia (*Com. v. Leftwich*, 5 Rand. 657; *Kelly v. Scott*, 5 Grat. 479), where, also, a man could not marry his brother's widow (*Com. v. Perryman*, 2 Leigh, 717). The law has since been changed in Virginia, and it is believed that such marriages are not now invalid in any state.

tion includes relatives of the half as well as the whole blood,¹³ and extends to persons of illegitimate as well as of legitimate birth.¹⁴

By the ecclesiastical law, marriages within the prohibited degrees were voidable merely, and not void,¹⁵ but by statute in England such marriages were in 1835 declared to be absolutely void.¹⁶ This is also the general trend of the American statutes, though under some statutes they have been held voidable merely.¹⁷

§ 14. Impotency.

An impotent person, physically incapable of consummating the marriage, cannot contract a valid marriage. By impotency is meant, not mere barrenness or sterility, but incapacity preventing complete and natural sexual intercourse. The incapacity must exist at the time of the marriage, and must continue and be incurable, to authorize a decree of nullity.¹⁸ But a decree will be

¹³ *Reg. v. Brighton*, 1 Best & S. 447, 101 E. C. L. 447; *Campbell v. Crampton*, 18 Blatchf. 150, 2 Fed. 417, 8 Abb. N. C. (N. Y.) 363.

¹⁴ *Reg. v. Brighton*, 1 Best & S. 447, 101 E. C. L. 447; *Morgan v. State*, 11 Ala. 289.

¹⁵ *Elliott v. Gurr*, 2 Phillim. Ecc. 16. See, also, *Sutton v. Warren*, 10 Metc. (Mass.) 451, *Woodruff*, Cas. 46.

¹⁶ Stat. 5 & 6 Wm. IV. c. 54; *Brook v. Brook*, 9 H. L. Cas. 193, 233.

¹⁷ See 1 Stimson, Am. St. Law, §§ 6112, 6113; *Campbell v. Crampton*, 18 Blatchf. 150, 2 Fed. 417, 8 Abb. N. C. (N. Y.) 363; *Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658; *Baity v. Cranfill*, 91 N. C. 293, 49 Am. Rep. 641; *Bowers v. Bowers*, 10 Rich. Eq. (S. C.) 551, 73 Am. Dec. 99. See, generally, 19 Am. & Eng. Enc. Law (2d Ed.) 1173-1175, and note in 79 Am. St. Rep. 380.

¹⁸ *Brown v. Brown*, 1 Hagg. Ecc. 523; *G. v. G.*, L. R. 2 Prob. Div. 287; *Anon.*, 89 Ala. 291, 18 Am. St. Rep. 116; *G. v. G.*, 33 Md. 401, 3 Am. Rep. 183; *Payne v. Payne*, 46 Minn. 467, 49 N. W. 230, 24 Am. St. Rep. 240; *Devanbakh v. Devanbakh*, 5 Paige (N. Y.) 554, 28 Am. Dec. 443. See, also, *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774,

granted, although the impotency might be cured by an operation not dangerous to life, where the afflicted party refuses to submit to the operation.¹⁹

The mere fact that the parties were of advanced age at the time of their marriage will not defeat a suit to avoid the marriage on the ground of impotency, but this fact may strongly incline the court against granting the relief sought.²⁰

Impotency is one of the canonical impediments, and renders the marriage voidable merely, and not void. The validity of a marriage, therefore, cannot be im-

Woodruff, Cas. 41. The mere fact that a woman, by reason of the removal of her ovaries, is unable to bear children, does not render her incapable of marriage. *Wendel v. Wendel*, 30 App. Div. 447, 52 N. Y. Supp. 72; reversing 22 Misc. 152, 49 N. Y. Supp. 375. Pregnancy of the woman at the time of the marriage does not constitute physical incapacity to marry. *Franke v. Franke* (Cal.) 31 Pac. 571, 18 L. R. A. 375.

In *Ryder v. Ryder*, 66 Vt. 158, 28 Atl. 1029, 44 Am. St. Rep. 833, it was held that chronic and incurable syphilis, rendering intercourse dangerous to the health of the other party, though not impossible, constitutes physical incapacity warranting the annulment of the marriage. In this case a decree was granted to the husband, although the wife, who was so afflicted at the time of the marriage, gave birth to a child which afterwards died of the disease. See, also, *Smith v. Smith*, 171 Mass. 404, 50 N. E. 933, 68 Am. St. Rep. 440. It is otherwise, however, if the disease is not contagious, and will yield to treatment. *Vondal v. Vondal*, 175 Mass. 383, 56 N. E. 586, 78 Am. St. Rep. 502.

¹⁹ *L. v. L.*, 7 Prob. Div. 16.

²⁰ *W. v. H.*, 2 Swab. & T. 240; *Briggs v. Morgan*, 2 Hagg. Consist. 324, 3 Phillim. Ecc. 325; *Shafto v. Shafto*, 28 N. J. Eq. 34; *Fulmer v. Fulmer*, 13 Phila. (Pa.) 166. In *Brown v. Brown*, 1 Hagg. Ecc. 523, Sir John Nicholl said: "A man of sixty, who marries a woman of fifty-two, should be contented to take her *tanquam soror*." Puffendorf considers such persons as "honorary members of the matrimonial state, enjoying a title without an office." Puff. lib. 6, c. 1, 25, quoted in *Fulmer v. Fulmer*, 13 Phila. (Pa.) 166.

peached on this ground after the death of one of the parties.²¹

§ 15. Prior marriage undissolved.

Polygamous or bigamous marriages are not only invalid by our law, but render the parties thereto subject to criminal prosecution. A valid prior subsisting marriage is therefore an impediment to a second marriage to a different spouse. A marriage contracted while one of the parties has a husband or wife living is an absolute nullity, and, except for the statutory modification presently to be noted, is good for no purpose whatsoever.²²

It is generally held that the fact that the second marriage was contracted in good faith, in the honest belief that the first marriage had been dissolved by death²³ or divorce,²⁴ does not render the second mar-

²¹ *A. v. B.*, L. R. 1 Prob. Div. 559. See, also, *Burtis v. Burtis*, Hopk. Ch. (N. Y.) 557, 14 Am. Dec. 563. For a full discussion of the subject of impotency in matrimonial law, see 19 Am. & Eng. Enc. Law (2d Ed.) 1165-1169, and extensive note in 28 Am. Dec. 446-451.

²² *Halbrook v. State*, 34 Ark. 511, 36 Am. Rep. 17; *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105; *Potter v. Clapp*, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322; *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41; *Barth v. Barth*, 102 Ky. 56, 42 S. W. 1116, 80 Am. St. Rep. 335; *Voorhees v. Voorhees*, 46 N. J. Eq. 411, 19 Am. St. Rep. 404; *Collins v. Voorhees*, 47 N. J. Eq. 315, 20 Atl. 676, 24 Am. St. Rep. 412; *Woodruff*, Cas. 48; *Fenton v. Reed*, 4 Johns. (N. Y.) 52, 4 Am. Dec. 244; *Gathings v. Williams*, 27 N. C. (5 Ired.) 487, 44 Am. Dec. 49; *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50; *Williams v. Williams*, 63 Wis. 58, 23 N. W. 110, 53 Am. Rep. 253; notes in 44 Am. Dec. 54; 46 Am. Dec. 130; 79 Am. St. Rep. 378. The supreme court has held Mormon polygamous marriage void and criminal. *Reynolds v. United States*, 98 U. S. 145.

²³ *Glass v. Glass*, 114 Mass. 563,

riage valid. A number of cases involving this question have arisen where a person whose husband or wife has been absent and not heard from for a number of years marries again, supposing the absent consort to be dead, when, in fact, he or she is alive. Except where the case is affected by statute, it is plain enough that the second marriage so contracted is absolutely void. A mere belief that one is competent to marry, when he is not, cannot remove the disability. The rule of the common law is found to work great hardship, however, where the second marriage was contracted in good faith; and in several states it is provided by statute that where any person whose husband or wife has been absent for five successive years, without being known to be living, shall marry during the lifetime of the absent party, the subsequent marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority. Under these statutes, the second marriage is valid unless and until set aside by a suit brought for that purpose by one of the parties to the marriage,²⁵ or, it seems, by the absentee, upon his or her return.²⁶

²⁴ Poole v. People, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 245; Gordon v. Gordon, 141 Ill. 160, 30 N. E. 446, 33 Am. St. Rep. 294, 21 L. R. A. 387.

²⁵ Jackson v. Jackson, 94 Cal. 446; Charles v. Charles, 41 Minn. 201, 42 N. W. 935; Gall v. Gall, 114 N. Y. 109; Price v. Price, 124 N. Y. 589, 27 N. E. 383. The rule of the statute is based upon the presumption that the absentee is dead, the common-law period of seven years being shortened to five. Charles v. Charles, 41 Minn. 201.

²⁶ See Valteau v. Valteau, 6 Paige (N. Y.) 207; Gall v. Gall, 114 N. Y. 109. The absentee cannot procure a divorce from his remarried consort on the ground that the cohabitation under the second marriage was adulterous, unless such cohabitation was continued after

But since the law cannot sanction polygamy by giving effect to both marriages at the same time, the first marriage is considered as suspended or placed in abeyance until its reinstatement by the setting aside of the second marriage.²⁷ In order to come within the protection of these statutes it must appear that the second marriage was contracted in good faith, in the belief that the absentee was dead.²⁸ Another class of statutes, more general in terms, provide that marriages prohibited by law on account of either of the parties having a former wife or husband then living shall be void from the time they are so declared by a decree of divorce or nullity.²⁹ In other states, however, the common-law rule is affirmed by statute, and all such marriages are declared to be absolutely void, without any decree of divorce or other legal process.³⁰ Again, other statutes, while not making valid the second marriage, protect the parties from prosecution for bigamy, where the marriage was contracted in

the second marriage had been set aside by judicial decree. *Valleau v. Valleau*, 6 Paige (N. Y.) 207.

²⁷ *Gall v. Gall*, 114 N. Y. 109.

²⁸ *Gall v. Gall*, 114 N. Y. 109.

²⁹ *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50.

³⁰ *Glass v. Glass*, 114 Mass. 563. This is the law in Virginia. Code Va. 1887, § 2252; *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50. In this case the court said: "But though such a marriage is void without judicial sentence of its nullity, for obvious reasons, such sentence is prudent and advisable, and the same statute, in section 4 [Code Va. 1887, § 2255], gave either party right to sue to obtain such a decree." The fact that the statute makes provision for annulling such marriages does not alter the statutory declaration that the marriage is void. *Drummond v. Irish*, 52 Iowa, 41.

good faith,³¹ or make the issue of such marriage legitimate.³²

The dissolution of the prior marriage by a divorce granted after the second marriage will not render the second marriage valid, for the decree of divorce becomes operative only when rendered, and does not relate back.³³ And the same rule would, of course, apply where the prior marriage is dissolved by death. But in either case, the continued cohabitation of the parties to the second marriage after the dissolution of the first may raise a presumption of a marriage by consent after the removal of the disability created by the former marriage.³⁴

A marriage contracted after a divorce of one of the parties, which for any reason is void,³⁵ or after a divorce which is not perfected or fully operative,³⁶ is unlawful.

³¹ *State v. Zichfeld*, 23 Nev. 304, 46 Pac. 802. Such a statute merely protects the party marrying again from prosecution for bigamy; it does not make the second marriage valid. *Fenton v. Reed*, 4 Johns. (N. Y.) 52, 4 Am. Dec. 244. But in several cases such statutes appear to have been construed as rendering the second marriage valid. See *Strode v. Strode*, 3 Bush (Ky.) 227, 96 Am. Dec. 211; *Hiram v. Pierce*, 45 Me. 367, 71 Am. Dec. 555.

³² *Leonard v. Braswell*, 99 Ky. 528, 36 S. W. 684; *Hiram v. Pierce*, 45 Me. 367, 71 Am. Dec. 555 (construing Massachusetts statute); *Glass v. Glass*, 114 Mass. 563.

³³ *Teter v. Teter*, 88 Ind. 494, 101 Ind. 129, 51 Am. Rep. 742; *Harris v. Harris*, 85 Ky. 49; *Hunt's Appeal*, 86 Pa. 294. See *In re Cook*, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 11 Am. St. Rep. 267; *In re McLaughlin's Estate*, 4 Wash. 570.

³⁴ See post, § 52.

³⁵ *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21; *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260; *Van Fossen v. State*, 37 Ohio St. 317, 41 Am. Rep. 507; *Allen v. Maclellan*, 12 Pa. 328, 51 Am. Dec. 608; *Hilton v. Roylance*, 25 Utah, 129, 69 Pac. 660, 95 Am. St. Rep. 821, 58 L. R. A. 723; *St. Sure v. Lindsfelt*, 82 Wis. 346, 52 N. W. 308, 33 Am. St. Rep. 50.

³⁶ *State v. Eaton*, 85 Wis. 587, 55 N. W. 890, 39 Am. St. Rep. 867. And see post, § 20.

§ 16. Want of age.

Children of immature judgment and physical development are plainly incapable of giving an intelligent consent to marriage, or of discharging the duties of the marriage relation. The age for contracting marriage, known as the "age of consent," is fixed by the common law at fourteen years in males and twelve in females. The marriage of persons of this age is as valid as the marriage of adults; but if either party is below the age of seven years, the marriage is a nullity. If both parties are over seven, but either is under the age of consent, the marriage, though not void, is voidable, and may be avoided by either party without any judicial decree. Such a marriage is said to be inchoate or imperfect. If both parties are under the age of consent, it may be avoided by either when both have reached that age. If one is below and the other above the age of consent, either may disaffirm when the one under age has reached the age of twelve or fourteen, as the case may be. If, when both have reached the age of consent, they affirm the marriage, it is thereafter binding without a new ceremony. Continuing to cohabit is a sufficient affirmance. The common-law rule as to the age of consent obtains in some states, but in others it has been changed by statute.³⁷ In some states the statutes provide that, where

³⁷ 1 Bl. Comm. 436; 1 Bishop, Mar., Div. & Sep. §§ 560-586; Schouler, Dom. Rel. § 20; 16 Am. & Eng. Enc. Law (2d Ed.) 263-265; note in 79 Am. St. Rep. 374; *Smith v. Smith*, 84 Ga. 440, 11 S. E. 496, 8 L. R. A. 362; *Henneger v. Lomas*, 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848; *Hervey v. Moseley*, 7 Gray (Mass.) 479, 66 Am. Dec. 515; *People v. Slack*, 15 Mich. 193; *State v. Lowell*, 78 Minn. 166, 80 N. W. 877, 79 Am. St. Rep. 358, 46 L. R. A. 440; *Koonce v. Wallace*, 52 N. C. (7 Jones) 194, Woodruff, Cas. 37; *Fisher v. Bernard*,

one of the parties is above the age of consent, the marriage shall be binding upon such party unless the other party elects to disaffirm it.³⁸

§ 17. Want of consent of parent or guardian.

By the civil law, the consent of parent or guardian was required in the case of the marriage of infants, but such consent was not necessary at common law.³⁹ In some states such consent is required by statute; but this requirement is generally directory merely, and its nonobservance does not invalidate the marriage.⁴⁰

§ 18. Want of reason.

The parties must be of sufficient mental capacity to give an intelligent consent. The marriage of a person mentally incapable of giving such consent is invalid.⁴¹

65 Vt. 663, 27 Atl. 316, Woodruff, Cas. 40; *Eliot v. Eliot*, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568; *Eliot v. Eliot*, 81 Wis. 295, 51 N. W. 81, 15 L. R. A. 259. As to the time when the marriage may be avoided, it seems that the better opinion now is that parties marrying before the age of consent may dissent to the marriage, and thus avoid it while still under age; but at common law, if one of the parties is above age, he cannot disaffirm the marriage until the other party arrives at the proper age. *Tyler, Inf. & Cov.* (2d Ed.) 134, 135; *Eliot v. Eliot*, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568.

³⁸ *People v. Slack*, 15 Mich. 193.

³⁹ 1 Bl. Comm. 437.

⁴⁰ 1 Bishop, Mar., Div. & Sep. §§ 551-559; 19 Am. & Eng. Enc. Law (2d Ed.) 1190; note in 79 Am. St. Rep. 375; *Hiram v. Pierce*, 45 Me. 367, 71 Am. Dec. 555; *Hervey v. Moseley*, 7 Gray (Mass.) 479, 66 Am. Dec. 515; *State v. Bittick*, 103 Mo. 183, 15 S. W. 325, 23 Am. St. Rep. 869; *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791. See, also, *Carskadden v. Poorman*, 10 Watts (Pa.) 82, 36 Am. Dec. 145.

⁴¹ 1 Bl. Comm. 438; *True v. Ranney*, 21 N. H. 52, 53 Am. Dec. 164; *Cole v. Cole*, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275; and cases cited in notes immediately following. See exhaustive note in 40 L. R. A. 737. See, also, note in 44 Am. Dec. 55. "It was formerly adjudged

There has been some difference of opinion as to what degree of mental capacity is necessary to enable a person to marry. Some authorities hold that the party must have the same degree of mental capacity as is required for ordinary contracts.⁴² "Every case," says Mr. Schouler, "stands on its own merits, but the usual test applied in the courts is that of fitness for the general transactions of life; for, it is argued, if a man is incapable of entering into other contracts, neither can he contract marriage. This test is sufficiently precise for most purposes; yet we apprehend the real issue is whether the man is capable of entering understandingly into the relation of marriage."⁴³

The prevailing test at present, and, it would seem, the true test, is the one here suggested, namely, whether the party had sufficient mental capacity to understand the nature and effect of the marriage contract, and the

that the issue of an idiot was legitimate, and consequently that his marriage was valid. A strange determination, since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to anything. And therefore the civil law judged much more sensibly when it made such deprivations of reason a previous impediment, though not a cause of divorce if they happened after marriage." 1 Bl. Comm. 438. The doctrine that the marriage of an idiot was valid seems to have grown out of the notion of the ecclesiastics that the ceremony of marriage was a sacrament, rather than a contract. Upon this theory, the validity of the marriage was made to depend upon the fact that the church had declared the parties to be married, rather than upon the consent of the parties themselves,—a doctrine absolutely sound if it be conceded that marriage is a sacrament, rather than a contract. See *Turner v. Meyers*, 1 Hagg. Consist. 414; *Cole v. Cole*, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275.

⁴² See *Turner v. Meyers*, 1 Hagg. Consist. 414; *Cole v. Cole*, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275.

⁴³ Schouler, Dom. Rel. § 18.

rights, duties, and responsibilities growing out of the marriage relation;⁴⁴ and this, it seems, does not require a high degree of intelligence.⁴⁵ Proof that a person is incapable of making ordinary contracts, or of attending to the general transactions of life, will, of course, raise a strong presumption that he is incapable, likewise, of contracting marriage, and will usually be sufficient to support a decree of nullity.⁴⁶ A person is not incompetent to marry because deaf and dumb.⁴⁷

To constitute an impediment, the mental incapacity must exist at the time of the marriage.⁴⁸ Insanity arising after marriage does not invalidate the marriage, and is no ground for divorce unless, as is rarely the case, it is so provided by statute.⁴⁹

The marriage of a lunatic during a lucid interval is valid.⁵⁰ Conversely, the marriage of a person, normally

⁴⁴ *Durham v. Durham*, 10 Prob. Div. 80; *Orchardson v. Cofield*, 171 Ill. 14, 49 N. E. 197, 63 Am. St. Rep. 211, 40 L. R. A. 256. See, also, *Lewis v. Lewis*, 44 Minn. 124, 46 N. W. 323, 20 Am. St. Rep. 559, *Woodruff*, Cas. 44; *Nonnemacher v. Nonnemacher*, 159 Pa. 634, 28 Atl. 439. It seems that it is not necessary that the party should understand all the duties, obligations, responsibilities, and rights growing out of the relation, but he must have sufficient mental capacity to understand the nature of the marriage relation, and of the marriage contract, and that he takes upon himself the duties, obligations, and responsibilities which the law imposes as a result of that contract, whatever they are. *St. George v. Biddeford*, 76 Me. 593.

⁴⁵ *Durham v. Durham*, 10 Prob. Div. 80.

⁴⁶ See, generally, *Foster v. Means*, 1 Speers Eq. (S. C.) 569, 42 Am. Dec. 332; *Cole v. Cole*, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275.

⁴⁷ *Harrod v. Harrod*, 1 Kay & J. 4.

⁴⁸ *Nonnemacher v. Nonnemacher*, 159 Pa. 634, 28 Atl. 439.

⁴⁹ *Hamaker v. Hamaker*, 18 Ill. 137, 65 Am. Dec. 705; *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774, *Woodruff*, Cas. 41; *Lewis v. Lewis*, 44 Minn. 124, 46 N. W. 323, 20 Am. St. Rep. 559.

⁵⁰ 1 Bishop, Mar., Div. & Sep. § 603; *Cumington v. Belchertown* 149 Mass. 223, 21 N. E. 435, 4 L. R. A. 131.

sane, during a period of temporary insanity, is invalid.⁵¹ Thus, drunkenness rendering a party *non compos mentis*, so that he does not know what he is doing, and is, for the time being, deprived of reason, renders the marriage invalid; but a degree of intoxication less than that stated will not invalidate the marriage.⁵²

The marriage of a person mentally incapable of consenting thereto is generally considered an absolute nullity, and no decree of avoidance is necessary.⁵³ Nevertheless, for the sake of the good order of society and the peace of mind of all concerned, it is deemed expedient that a decree of nullity be obtained.⁵⁴ And in some states it is provided by statute that the marriage of a lunatic shall be void only from the time when it is so declared by judicial decree.⁵⁵

It has been held that a lunatic, on regaining his reason, may affirm a marriage entered into by him when insane;

⁵¹ 1 Bishop, Mar., Div. & Sep. § 604.

⁵² *Prine v. Prine*, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87.

⁵³ *Orchardson v. Cofield*, 171 Ill. 14, 49 N. E. 197, 63 Am. St. Rep. 211, 40 L. R. A. 256; *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774; *Woodruff*, Cas. 41; *Jenkins v. Jenkins*, 2 Dana (Ky.) 102, 26 Am. Dec. 437; *Unity v. Belgrade*, 76 Me. 419; *Crump v. Morgan*, 38 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447; *Sims v. Sims*, 121 N. C. 297, 28 S. E. 407, 61 Am. St. Rep. 665, 40 L. R. A. 737; *Foster v. Means*, 1 Speers Eq. (S. C.) 569, 42 Am. Dec. 332. The invalidity of a marriage on the ground of the insanity of one of the parties may be set up in a suit brought after the death of such party. *Orchardson v. Cofield*, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256; *Jenkins v. Jenkins*, 2 Dana (Ky.) 102, 26 Am. Dec. 437; *Foster v. Means*, 1 Speers Eq. (S. C.) 569, 42 Am. Dec. 332. See, also, *State v. Setzer*, 97 N. C. 252, 2 Am. St. Rep. 290.

⁵⁴ 2 Kent, Comm. 76; *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774.

⁵⁵ 1 Stimson, Am. St. Law, § 6113.

and this without any new solemnization.⁵⁶ It is submitted that this is not correct. Considering the marriage as void (as it is usually held to be), it cannot be ratified.⁵⁷ This case differs from that of an infant's marriage, for such a marriage is not void, but merely imperfect or "inchoate," and so may be ratified. The true view would seem to be that what is relied upon as a ratification by the lunatic, if it can have any effect, can operate only as a new marriage at common law, and not as a ratification of a marriage which, being void, could not be ratified. This question is now settled in some states by statutes providing that the marriage shall not be void or voidable, or be annulled where the parties have cohabited after the lunatic has been restored to reason.⁵⁸

The burden of proving the invalidity of a marriage by reason of the insanity of one of the parties thereto rests upon the party asserting it;⁵⁹ and the proof of insanity should be very clear. Every consideration of policy and humanity demands that a contract so essentially connected with the peace and happiness of individuals and families, and the well-being of society, should not be

⁵⁶ *Cole v. Cole*, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275. See *Prine v. Prine*, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87; 1 Bishop, Mar., Div. & Sep. § 614 et seq.

⁵⁷ *Sims v. Sims*, 121 N. C. 297, 28 S. E. 407, 61 Am. St. Rep. 665, 40 L. R. A. 737.

⁵⁸ 1 Stimson, Am. St. Law, § 6113.

⁵⁹ *Nonnemacher v. Nonnemacher*, 159 Pa. 634, 28 Atl. 439; *Cole v. Cole*, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275. Every presumption is in favor of the mental capacity of the parties to contract marriage, and the burden of proving incapacity is upon the party impeaching the marriage. *Harrod v. Harrod*, 1 K. & J. 4.

annulled on this or any other ground not clearly made out.⁶⁰

§ 19. Impediments of race or social condition.

Differences of race or social rank constitute no impediment to marriage at common law, or under the present law of England. Nor do differences of rank constitute an impediment in this country; but in a number of the states, marriages between white persons and persons of negro blood are prohibited by statute, and are invalid,⁶¹ and generally, in these states, it is made a criminal offense for a white person and a negro to intermarry.⁶² Statutes prohibiting miscegenation have been held valid, within the United States constitution, by several state courts and inferior federal courts,⁶³ and would doubtless be sustained if submitted to the United States supreme court.⁶⁴

⁶⁰ *Cole v. Cole*, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275.

⁶¹ 1 Stimson, Am. St. Law, § 6112; *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131 (statute not now in force); *Greenhow v. James*, 80 Va. 636, 56 Am. Rep. 603. See, also, *Barkshire v. State*, 7 Ind. 389, 65 Am. Dec. 738.

⁶² *Green v. State*, 58 Ala. 190, 29 Am. Rep. 739; *State v. Gibson*, 36 Ind. 389, 10 Am. Rep. 42; *State v. Jackson*, 80 Mo. 175, 50 Am. Rep. 499; *State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 683; *State v. Bell*, 7 Baxt. (Tenn.) 9, 32 Am. Rep. 549; *Frasher v. State*, 3 Tex. App. 263, 30 Am. Rep. 131; *Kinney v. Com.*, 30 Grat. (Va.) 858, 32 Am. Rep. 690.

⁶³ *In re Hobbs*, 1 Woods, 537, Fed. Cas. No. 6,550; *State v. Tutty*, 41 Fed. 753, 7 L. R. A. 50; *Green v. State*, 58 Ala. 190, 29 Am. Rep. 739, overruling *Burns v. State*, 48 Ala. 195, 17 Am. Rep. 34; *State v. Gibson*, 36 Ind. 389, 10 Am. Rep. 42; *State v. Jackson*, 80 Mo. 175, 50 Am. Rep. 499; *Frasher v. State*, 3 Tex. App. 263, 30 Am. Rep. 131.

⁶⁴ *In Pace v. Alabama*, 106 U. S. 583, it was held that a statute

The statutes usually designate the persons who shall be deemed negroes or colored persons, within their meaning, and include not only full-blooded negroes, but also all other persons with an admixture of negro blood, varying from one-fourth to one-eighth. Under these statutes, a person of negro blood amounting to less than the proportion fixed by the statute is legally white, and cannot be prosecuted for marrying a person of pure white blood, such marriages being lawful.⁶⁵

Unless prohibited by statute, the marriage of a white person with an Indian is valid;⁶⁶ but in a few states such marriages are made void by statute.⁶⁷ And in several

of Alabama prohibiting the intermarriage or living together in adultery or fornication of a white person and a negro, was not in conflict with the constitution of the United States, although a greater punishment was provided for living together in adultery and fornication where the parties were of different races than where they were of the same race. In this case the parties do not appear to have been intermarried, and the question as to the constitutionality of that part of the statute relating to intermarriage was not involved.

⁶⁵ *McPherson v. Com.*, 28 Grat. (Va.) 939; *Jones v. Com.*, 80 Va. 538.

⁶⁶ *Wells v. Thompson*, 13 Ala. 793, 48 Am. Dec. 76. The question of the validity of the marriage of a white person and an Indian has arisen in several cases in which the validity of the marriage was attacked, not on the ground that the parties were of different race, but on the ground that the marriage had not been properly celebrated, or that a marriage in the Indian sense was not a true marriage. Such a marriage was sustained in *Meister v. Moore*, 96 U. S. 76; *Johnson v. Johnson*, 30 Mo. 72, 77 Am. Dec. 598. The validity of intermarriages of whites and Indians has been recognized by congress by the act of August 9, 1888 (25 Stat. 392; 3 Fed. Ann. St. 517).

⁶⁷ *In re Walker's Estate* (Ariz.; 1896) 46 Pac. 67; *In re Wilbur's Estate*, 8 Wash. 35, 35 Pac. 407, 40 Am. St. Rep. 886.

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states marriages of white persons with Mongolians are declared void.⁶⁸

In this connection should be noted the marriage of slaves. A slave, being subject to his master's will, had not the legal capacity to contract marriage, yet the so-called marriages of slaves had a certain moral force, and were recognized for certain purposes, and, after the abolition of slavery, existing slave marriages were confirmed by various constitutional or statutory provisions.⁶⁹

§ 20. Impediments following divorce.

Where a marriage is dissolved by a decree of absolute divorce, either party may marry again, although the ex-consort be still living, unless prohibited by statute. But in several states the remarriage of both parties for a certain period, or of the guilty party during the lifetime of the other, or for a term of years, or to his or her partner in guilt, or without permission of court, is prohibited by statute, the terms of the prohibition varying in the different states. Statutes imposing such restrictions are not unconstitutional, nor void as being contrary to public policy.⁷⁰ There is some conflict among the authori-

⁶⁸ Arizona: Rev. St. 1901, § 3092. California: Civ. Code, § 60. Utah: Rev. St. 1898, § 1184.

⁶⁹ See *Renfrow v. Renfrow*, 60 Kan. 277, 56 Pac. 534, 72 Am. St. Rep. 350; *Scott v. Raub*, 88 Va. 721; 19 Am. & Eng. Enc. Law (2d Ed.) 1169.

⁷⁰ *Eaton v. Eaton* (Neb.) 92 N. W. 995, 60 L. R. A. 605; *Owen v. Bracket*, 7 Lea (Tenn.) 448. See, also, *Musik v. Musik*, 88 Va. 12. In *Elliott v. Elliott*, 38 Md. 357, it was held that such a statute was not unconstitutional, although retrospective in its operation. The court based its decision upon the determination that such prohibi-

ties as to the precise nature and effect of such a prohibition. As has been well said, it is difficult to understand how a marriage can be dissolved as to one of the parties without being equally dissolved as to the other.⁷¹ Certainly, a wife without a husband, or a husband without a wife, is an anomaly;⁷² and a court, on dissolving a marriage, has no power to impose any restraint upon a second marriage by either party, unless such power is expressly conferred by statute.⁷³ It is generally held that such a prohibition, when imposed on the guilty party, is in the nature of a penalty or punishment.⁷⁴ Where the

tions imposed on the guilty party are not penal in nature, which is contrary to the generally accepted doctrine.

⁷¹ Browne, Div. p. 41.

⁷² Crawford v. State, 73 Miss. 172, 18 So. 848, 35 L. R. A. 224. "To affirm that a person is married, and yet has no legal husband or wife, is manifestly a solecism. In the very nature of things, the marriage contract under such circumstances cannot exist. There cannot be a husband without a wife, nor a wife without a husband. The existence of the one necessarily and conclusively implies the existence of the other. Husband and wife are correlative terms. Anything, therefore, which destroys that relation as to one party necessarily destroys it as to the other." Per Rice, J., in State v. Weatherby, 43 Me. 258, 69 Am. Dec. 59.

⁷³ Barber v. Barber, 16 Cal. 378.

⁷⁴ Succession of Hernandez, 46 La. Ann. 962, 24 L. R. A. 831; Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505. See note 77, *infra*. In Elliott v. Elliott, 38 Md. 357, it was held that the prohibition is not a penalty, but merely a denial of relief to the offender, and a continuance of the incapacity to marry resulting from the previously existing marriage. This doctrine seems to the author to be wholly without foundation in reason. It savors of absurdity to say that a man who has been divorced remains under the incapacity to marry arising from his marriage, which incapacity consists solely in his having a wife, when in fact he no longer has a wife. It is idle to speak of denying relief, i. e., relief from having a wife, where the law has already granted such relief by taking the wife away. It seems plain that the sole purpose of this prohibition is to

statute expressly so declares, a marriage contracted within the state, in disregard of the prohibition, is absolutely void;⁷⁵ but where the prohibited marriage is merely declared to be unlawful, such marriage is voidable merely, and not void.⁷⁶ The question will, of course, be largely controlled by the language of the statutes. It is almost universally held that the statutes, being penal in their nature, have no extraterritorial operation, and the party prohibited in one state from marrying may nevertheless contract a valid marriage in another state.⁷⁷ Moreover, the statutes apply only to divorces granted within the state.⁷⁸

punish the offender. This case, as noted in the text, is distinguishable from those cases in which both parties are prohibited for a certain time from marrying again.

⁷⁵ Succession of Taylor, 39 La. Ann. 825; White v. White, 105 Mass. 325, 7 Am. Rep. 526; Cropsey v. Ogden, 11 N. Y. 228. As to the criminal liability of the guilty party in marrying again, see Com. v. Putnam, 1 Pick. (Mass.) 136; Com. v. Richardson, 126 Mass. 34, 30 Am. Rep. 647; Crawford v. State, 73 Miss. 172, 18 So. 848, 35 L. R. A. 224; People v. Faber, 92 N. Y. 146, 44 Am. Rep. 357.

⁷⁶ Park v. Barron, 20 Ga. 702, 65 Am. Dec. 641; Mason v. Mason, 101 Ind. 25; Crawford v. State, 73 Miss. 172, 18 So. 848, 35 L. R. A. 224. The second marriage may be set aside at the suit of the innocent party, who was ignorant of the prohibition. Ovitt v. Smith, 68 Vt. 35, 33 Atl. 769, 35 L. R. A. 223. In Owen v. Bracket, 7 Lea (Tenn.) 448, it was held under such a statute that the parties to the second marriage could not claim a homestead as husband and wife.

⁷⁷ Wilson v. Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. Rep. 768; Phillips v. Madrid, 83 Me. 205, 23 Am. St. Rep. 770, 12 L. R. A. 862; West Cambridge v. Lexington, 1 Pick. (Mass.) 505, 11 Am. Dec. 231; Dickson v. Dickson, 1 Yerg. (Tenn.) 110, 24 Am. Dec. 444; Willey v. Willey, 22 Wash. 115, 60 Pac. 145, 79 Am. St. Rep. 923. See post, § 44.

⁷⁸ Phillips v. Madrid, 83 Me. 205, 23 Am. St. Rep. 770, 12 L. R. A. 862; Bullock v. Bullock, 122 Mass. 3. See, contra, as to the New York statute, Smith v. Woodworth, 44 Barb. (N. Y.) 198. In Suc-

Statutes prohibiting either party from contracting a marriage with a third person, after a decree of divorce, until the determination of an appeal, or the expiration of the time allowed for taking an appeal, stand on a different footing from those in which the guilty party only is prohibited from marrying again. In the latter case the marriage is dissolved, although one of the parties is prohibited from remarrying; but in the former case the decree is not operative so long as an appeal is pending or may be taken, and hence the marriage is not fully dissolved. Neither party, therefore, is capable of marrying a third person, and a marriage in disregard of the prohibition is a nullity, whether celebrated within the state in which the divorce was granted,⁷⁹ or in another state.⁸⁰

cession of Hernandez, 46 La. Ann. 962, 15 So. 461, 24 L. R. A. 831, it was held that the New York statute prohibiting the marriage of the guilty party after divorce did not apply to and invalidate a marriage between persons residing out of the state of New York, although the marriage was celebrated in that state. In this case the husband had been divorced in Louisiana for his adultery, and afterwards married in New York a woman domiciled in Paris. At the time of the marriage the parties intended to, and afterwards actually did, reside in Louisiana, in which state the marriage, if there celebrated, would have been valid.

⁷⁹ Wilhite v. Wilhite, 41 Kan. 154, 21 Pac. 173; Schuchart v. Schuchart, 61 Kan. 597, 60 Pac. 311, 78 Am. St. Rep. 342, 50 L. R. A. 180; Eaton v. Eaton (Neb.) 92 N. W. 995, 60 L. R. A. 605; In re Smith's Estate, 4 Wash. 702, 30 Pac. 1059, 17 L. R. A. 573. See, also, Cox v. Combs, 8 B. Mon. (Ky.) 231. But if, under the statute, the right of appeal has been lost, and the decree become final, although the time allowed for appeal has not expired, the second marriage is valid. Conn v. Conn, 2 Kan. App. 419, 42 Pac. 1006.

⁸⁰ McLennan v. McLennan, 31 Or. 480, 50 Pac. 802, 65 Am. St. Rep. 835, 38 L. R. A. 863. But see, contra, Willey v. Willey, 22 Wash. 115, 60 Pac. 145, 79 Am. St. Rep. 923. In this case it was held that the prohibition had no extraterritorial effect, and that the marriage in another state was valid. The court seems to consider the

Such a prohibition is not penal in its nature, but applies to both parties,—to the innocent as well as to the guilty, —and simply affects their capacity to remarry until the divorce has become fully operative.⁸¹

III. REALITY OF CONSENT.

§ 21. In general.

A party to a marriage must not only be competent to give his consent thereto, but such consent must be a real consent; that is, it must be given voluntarily, and upon a sufficient comprehension of the facts. A consent given under duress or misapprehension, or procured by fraud, is not such a consent as is essential to a valid marriage, and a marriage procured through duress, error, or fraud is void, at least in the sense that it may be avoided. We shall consider this question in detail.

§ 22. Marriage under duress.

A consent to a marriage given under duress is no consent, and, if it appears that one of the parties to an alleged marriage consented thereto through fear or duress, the marriage is invalid.⁸² As has been well said:⁸³

divorce fully operative, notwithstanding the prohibition. As pointed out by the chief justice in a separate opinion, this case directly conflicts with the prior decision in *Re Smith's Estate*, 4 Wash. 702. He adds: "I am convinced, however, that the decision in that case is opposed to the great weight of authority upon the question." In the author's opinion, the decision in the earlier case is absolutely sound, and the later decision incorrect.

⁸¹ *McLennan v. McLennan*, 31 Or. 480, 50 Pac. 802, 65 Am. St. Rep. 835, 38 L. R. A. 863.

⁸² *Ferlat v. Gojon*, Hopk. Ch. (N. Y.) 478, 14 Am. Dec. 554; *Willard v. Willard*, 6 Baxt. (Tenn.) 297, 32 Am. Rep. 529; *Mountholly v.*

"The courts of law have always refused to recognize as binding contracts to which the consent of either party has been obtained by fraud or duress, and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract.⁸⁴ True it is that in contracts of marriage there is an interest involved above and beyond that of the immediate parties. Public policy requires that marriages should not be lightly set aside,⁸⁵ and there is in some cases the strongest temptation to the parties more imme-

Andover, 11 Vt. 226, 34 Am. Dec. 685; notes in 79 Am. St. Rep. 370, and 43 L. R. A. 814; 19 Am. & Eng. Enc. Law (2d Ed.) 1188.

⁸³ By Butt, J., in *Scott v. Sebright*, 12 Prob. Div. 21.

⁸⁴ It has been said that the same duress that will avoid an ordinary contract will be sufficient to avoid a marriage. 1 Bishop, Mar., Div. & Sep. § 538. It may be doubted whether this is a correct statement of the law if by it is meant that the contract of marriage is to be judged in this connection by the same standard as other contracts. Since marriage is a public as well as a private relation, public policy requires that marriages should not be lightly set aside, and hence it would seem that more care should be exercised by the courts in setting aside a marriage for duress than in the case of an ordinary contract. The rule is a mere generality of little practical value, and probably means no more than that the contract of marriage, like any other contract, may be set aside for duress sufficient to overcome the will of a party as to that particular contract. And since the degree of resistance offered by an unwilling party to a contract will ordinarily be in proportion to the importance of the contract, it seems that marriage, the most important of all possible contracts, should be set aside only where the duress was of a most pronounced character. In any case, however, the sole inquiry is whether the will of the particular party in question was so overcome that the consent given by him to the alleged marriage was not voluntary; and this is a pure question of fact in each case.

⁸⁵ "In all cases of this nature it is highly necessary that great caution and deliberation should be observed by the court because of the consequences of the nullity of marriage to the parties and to the public." Per Hay, J., in *Harford v. Morris*, 2 Hag. Consist. 423.

diately interested to act in collusion in obtaining a dissolution of the marriage tie. These reasons necessitate great care and circumspection on the part of the tribunal, but they in no wise alter the principle or the grounds on which this, like any other contract, may be avoided."

No precise rule can be laid down as to what will constitute such force or duress as will invalidate a marriage, except that the force or duress must be such as to overcome the will of the person subjected thereto, so as to render his or her consent involuntary. What acts or circumstances will have this effect will plainly vary with the character of the person for courage and resolution. In all cases regard must be had to the age, sex, and condition of the party. "It has sometimes been said," said the court in a recent case,⁸⁶ "that in order to avoid a contract entered into through fear, the fear must be such as would impel a person of ordinary courage and resolution to yield to it. I do not think that is an accurate statement of the law. Whenever, from natural weakness of intellect or from fear, whether reasonably entertained or not, either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger. The difficulty consists, not in any uncertainty of the law on the subject, but in its application to the facts of each individual case." This is plainly correct. In any case, the

⁸⁶ Scott v. Sebright, 12 Prob. Div. 21.

question is not whether a person of ordinary courage and resolution would have yielded in the circumstances shown, but whether, in fact, the will of the particular person was overcome. This, of course, is a pure question of fact, and each case must be determined according to its own circumstances.⁸⁷

To constitute duress, the force must be unlawful. Thus, if a man, lawfully arrested for probable cause and without malice on a charge of seduction, marries the woman to procure his discharge, he cannot have the marriage avoided upon the ground of duress.⁸⁸ And it has been held that the fact that he could not have been convicted of the seduction does not alter the case.⁸⁹ But where such arrest was in a proceeding instituted maliciously and without probable cause, the marriage will be set aside.⁹⁰

For threats of bodily harm to constitute a ground for avoiding a marriage, it must appear that they were the sole reason for the party's marrying, and that he was not induced to marry by other reasons. Thus, if it appears that the man married the woman in order to make

⁸⁷ For illustrative cases see *Harford v. Morris*, 2 Hagg. Consist. 423; *Scott v. Sebright*, 12 Prob. Div. 21; *Honnett v. Honnett*, 33 Ark. 156, 34 Am. Rep. 39.

⁸⁸ *Marvin v. Marvin*, 52 Ark. 425, 20 Am. St. Rep. 191; *Jackson v. Winne*, 7 Wend. (N. Y.) 47, 22 Am. Dec. 563; *Scott v. Shufeldt*, 5 Paige (N. Y.) 43; *Medrano v. State*, 32 Tex. Cr. R. 214, 22 S. W. 684, 40 Am. St. Rep. 775; *Copeland v. Copeland* (Va.; 1895) 21 S. E. 241.

⁸⁹ *Marvin v. Marvin*, 52 Ark. 425, 20 Am. St. Rep. 191. See, also, *Scott v. Shufeldt*, 5 Paige (N. Y.) 43.

⁹⁰ *Smith v. Smith*, 51 Mich. 607; *Shoro v. Shoro*, 60 Vt. 268, 6 Am. St. Rep. 118.

reparation for the wrong he had done her, or to regain his standing in the community, or for other similar reasons, he cannot have the marriage set aside, although his consent was given with reluctance, and he may have been somewhat influenced by threats of violence.⁹¹

The authorities are in some confusion as to whether a marriage procured by duress is void, voidable, or neither, according to the uncertain and variable meaning attached to these words.⁹² On principle, since there is no consent, the marriage is absolutely void; and it has been so held.⁹³ Clearly the marriage is so far invalid that

⁹¹ *Honnett v. Honnett*, 33 Ark. 156, 34 Am. Rep. 39; *Collins v. Ryan*, 49 La. Ann. 1710, 22 So. 920, 43 L. R. A. 814; *Todd v. Todd*, 149 Pa. St. 60, 24 Atl. 128, 17 L. R. A. 320.

⁹² See 1 Bishop, Mar., Div. & Sep. § 548. The courts speak of such marriages as void or voidable, without using these terms in any precise or constant sense.

⁹³ In *Mountholly v. Andover*, 11 Vt. 226, 34 Am. Dec. 685, it was held that a marriage celebrated by a justice of the peace without the consent of the parties, being a marriage by force or duress, was absolutely void, and might be impeached in a collateral proceeding. See, also, *Bassett v. Bassett*, 9 Bush (Ky.) 696; *Ferlat v. Gojon*, Hopk. Ch. (N. Y.) 478. It has been stated or intimated in several cases that a marriage under duress may be ratified or affirmed by the coerced party after the removal of the duress. This, of course, would be to hold that the marriage is not absolutely void, for a void marriage cannot be ratified. An examination of the cases, however, will show that either there was no ratification or no duress, and hence the statements made are dicta merely. See *Hampstead v. Plaistow*, 49 N. H. 84; *Richards v. Richards*, 19 Pa. Co. Ct. R. 322; *Miller v. Miller*, 43 S. C. 306. In this connection, a marriage under duress should, perhaps, be distinguished from a marriage procured by fraud. In the former case the consent, not being voluntary, is no consent, and hence the marriage is properly a nullity, while in the latter case the consent is a real consent, voluntarily given, although induced by fraud. Such a marriage is therefore valid unless disaffirmed.

it may be set aside at the suit of the party coerced.⁹⁴ It would seem plain that where, notwithstanding duress, the party did not consent, but positively refused to consent, the marriage is absolutely void.⁹⁵

In cases in which the party coerced seeks to have the marriage annulled, it will generally be found that the marriage has never been consummated, and the parties separated immediately after the ceremony.⁹⁶ This fact, of course, would not, of itself, prevent the marriage from being binding,⁹⁷ but it would more strongly incline the court to dissolve it, and, where the nonconsummation was due to the plaintiff's refusal to cohabit with the defendant, it would undoubtedly be evidence tending to establish the fact of coercion. On the other hand, it would seem that the voluntary consummation of the marriage after the removal of the alleged coercion would tend to prove the absence of coercion.

§ 23. Marriage procured by fraud—In general.

The consent to a marriage cannot be said to be voluntary where it was induced by fraud, but for which it

⁹⁴ *Bassett v. Bassett*, 9 Bush (Ky.) 696; *Ferlat v. Gojon*, Hopk. Ch. (N. Y.) 478, 14 Am. Dec. 554; *Willard v. Willard*, 6 Baxt. (Tenn.) 297, 32 Am. Rep. 529. In *Lacoste v. Guidroz*, 47 La. Ann. 295, 16 So. 836, it was said that a marriage the consent to which was procured by threats is not void, but merely voidable.

⁹⁵ See *Roszel v. Roszel*, 73 Mich. 133, 16 Am. St. Rep. 569.

⁹⁶ See *Scott v. Sebright*, 12 Prob. Div. 21; *Roszel v. Roszel*, 73 Mich. 133, 16 Am. St. Rep. 569; *Ferlat v. Gojon*, Hopk. Ch. (N. Y.) 478, 14 Am. Dec. 554; *Miller v. Miller*, 43 S. C. 306; *Willard v. Willard*, 6 Baxt. (Tenn.) 297, 32 Am. Rep. 529. In *Harford v. Morris*, 2 Hagg. Consist. 423, the marriage was annulled, notwithstanding consummation.

⁹⁷ *Collins v. Ryan*, 49 La. Ann. 1710, 43 L. R. A. 814. And see post, § 31, that consummation is not essential.

would not have been given. Such fraud will in some cases render the marriage invalid.

It may be a matter of some difficulty at times to determine whether or not the alleged fraud is such as will invalidate the marriage. It is settled, however, that fraud which would vitiate an ordinary contract will not necessarily have this effect.⁹⁸ From considerations of public policy, a marriage will not be lightly declared void for fraud or other reason.⁹⁹ The fraud relied on to avoid the marriage must affect the essentials of the relation. Thus, concealments or misrepresentations by a party as to his or her position or circumstances in life, or traits or defects of character, habits, temper, reputation, health, and the like, are no ground for avoiding

⁹⁸ *Smith v. Smith*, 171 Mass. 404, 50 N. E. 933, 68 Am. St. Rep. 440; *Allen's Appeal*, 99 Pa. 196, 44 Am. Rep. 101. In *Smith v. Smith*, 171 Mass. 404, 50 N. E. 933, 68 Am. St. Rep. 440, the court said: "There is no reason why executory contracts of marriage should not be treated, in reference to the fraud of either party, like any other contracts. We think it is well settled that fraud of such a kind in its essential elements as would invalidate an ordinary contract is a good defense to an action upon a contract to marry; but after a contract to marry has ripened into a marriage, different considerations affect the case. On grounds of public policy, the law seeks to make the marriage relation in every case as nearly permanent as possible without doing injustice. The difference between the relations of a man and woman affianced and their relations after marriage is more than the difference between those who have made an ordinary executory contract, and the same persons after the contract is executed. At marriage there is a change of status, which affects them and their posterity and the whole community. It is a change which, for important reasons, the law recognizes, and it inaugurates conditions and relations which the law takes under its protection. It is of such a nature that it cannot lightly be disregarded."

⁹⁹ *Smith v. Smith*, 171 Mass. 404, 50 N. E. 933, 68 Am. St. Rep. 440.

the marriage. These are accidental qualities, and do not constitute the essential and material elements on which the marriage relation rests; and the parties must assume the burden of informing themselves by acquaintance and inquiry as to these matters before they enter into so important a relation.¹⁰⁰ Upon their marriage they take each other for better or worse, and agree to abide the consequences of misinformation or mistake in regard to each other.¹⁰¹

A number of cases have arisen which quite fully set forth the attitude of the courts as to what fraud does or does not affect the essentials of the marriage relation. Thus, the courts have refused to annul a marriage on the ground that the woman concealed the fact that she was a kleptomaniac,¹⁰² or that she had been previously married and divorced,¹⁰³ or had previously been insane.¹⁰⁴ So, also, chastity is not a requisite to the validity of a marriage,¹⁰⁵ and hence the concealment by the woman of her unchastity, or her fraudulent representation that she was chaste, is no ground for annulling the marriage.¹⁰⁶ Plainly, if the man knew or sus-

¹⁰⁰ *Reynolds v. Reynolds*, 3 Allen (Mass.) 605; *Smith v. Smith*, 171 Mass. 404, 50 N. E. 933, 68 Am. St. Rep. 440; *Lewis v. Lewis*, 44 Minn. 124, 46 N. W. 323, 20 Am. St. Rep. 559, 9 L. R. A. 505.

¹⁰¹ *Smith v. Smith*, 171 Mass. 404, 50 N. E. 933, 68 Am. St. Rep. 440.

¹⁰² *Lewis v. Lewis*, 44 Minn. 124, 46 N. W. 323, 20 Am. St. Rep. 559, 9 L. R. A. 505.

¹⁰³ *Donnelly v. Strong*, 175 Mass. 157, 55 N. E. 892.

¹⁰⁴ *Cumington v. Belchertown*, 149 Mass. 223, 21 N. E. 435, 4 L. R. A. 131. In this case the wife had been insane before the marriage, but was sane at the time of the marriage, though she afterwards again became insane.

¹⁰⁵ *Leavitt v. Leavitt*, 13 Mich. 452, and cases cited in note immediately following.

¹⁰⁶ *Delpit v. Young*, 51 La. Ann. 923, 25 So. 547; *Varney v. Varney*,

pected that the woman was unchaste, and nevertheless married her, he cannot have the marriage annulled for fraudulent concealment of unchastity.¹⁰⁷

According to the weight of authority in this country, the pregnancy of the woman, at the time of the marriage, concealed from the husband, who has not himself, previous to the marriage, sustained improper relations with the wife, is a fraud which is a sufficient ground for avoiding the marriage if the husband, upon the discovery of the fact, ceases to cohabit with and abandons the

52 Wis. 120, 38 Am. Rep. 726; Williams v. Williams, 63 Wis. 58, 53 Am. Rep. 253. The concealment by the woman of the fact that she had given birth to an illegitimate child is not such fraud as will invalidate the marriage. Smith v. Smith, 8 Or. 100. See, also, Farr v. Farr, 2 MacArthur (D. C.) 35. In Reynolds v. Reynolds, 3 Allen (Mass.) 605, in discussing the question as to what fraud will vitiate a marriage, the court said: "Nothing can then [i. e., after the contract is executed] avoid it which does not amount to a fraud in the essentialia of the marriage relation. And as mere incontinence in a woman prior to her entrance into the marriage contract, not resulting in pregnancy, does not necessarily prevent her from being a faithful wife, or from bearing to her husband the pure offspring of his loins, there seems to be no sufficient reason for holding misrepresentation or concealment on the subject of chastity to be such a fraud as to afford a valid ground for declaring a consummated marriage void. In regard to continence, as well as to other personal traits and attributes of character, it is the duty of a party to make due inquiry beforehand, and not to ask the law to relieve him from a position into which his own indiscretion or want of diligence has led him. Certainly it would lead to disastrous consequences if a woman who had once fallen from virtue could not be permitted to represent herself as continent, and thus restore herself to the rights and privileges of her sex, and enter into matrimony without incurring the risk of being put away by her husband on discovery of her previous immorality. Such a doctrine is inconsistent with reason and a wise and sound policy."

¹⁰⁷ Farr v. Farr, 2 MacArthur (D. C.) 35; Steele v. Steele, 96 Ky. 382, 29 S. W. 17; Donnelly v. Strong, 175 Mass. 157, 55 N. E. 892.

wife.¹⁰⁸ This case is distinguished from that of the concealment of a mere previous want of chastity on the ground that, while a mere want of chastity does not prevent a woman from discharging the duties of a true and faithful wife, pregnancy at the time of marriage renders her incapable, at least for the time being, of bearing a child to her husband, and also subjects him to the painful alternative of either disowning the child, and thereby publishing to the world his wife's shame, or acknowledging the illegitimate child of another as his own, and permitting him to share in his bounty, and receive support along with his own legitimate children.¹⁰⁹ This reasoning, however, is regarded as unsatisfactory in England, and the American doctrine has been there repudiated on the ground that such pregnancy does not go to the essence of the marriage.¹¹⁰ And it has been so held, also, in North Carolina.¹¹¹ Where the husband has himself had intercourse with the wife before marriage, her concealed pregnancy by another man is not

¹⁰⁸ *Baker v. Baker*, 13 Cal. 88; *Reynolds v. Reynolds*, 3 Allen (Mass.) 605; *Harrison v. Harrison*, 94 Mich. 559, 34 Am. St. Rep. 364, Woodruff, Cas. 58. See, also, *Allen's Appeal*, 99 Pa. 196, 44 Am. Rep. 101. See note in 18 L. R. A. 375. In a number of states, such pregnancy is by statute made a ground of divorce.

¹⁰⁹ *Reynolds v. Reynolds*, 3 Allen (Mass.) 605.

¹¹⁰ *Moss v. Moss* [1897] Prob. Div. 263. See, also, 1 Bishop, Mar., Div. & Sep. §§ 486-495, in which the learned author reviews the case of *Reynolds v. Reynolds*, 3 Allen (Mass.) 605, and, while approving the result reached in that case, says: "It cannot, consequently, be disguised that the reasoning on which this case proceeds is, when looked at it in its parts, unsatisfactory." Section 494.

¹¹¹ *Long v. Long*, 77 N. C. 304, 24 Am. Rep. 449. The dissolution of the marriage in such case is now authorized by statute in this state. Code, § 1285. See *Steel v. Steel*, 104 N. C. 631.

fraud sufficient to avoid the marriage. In such case the husband is put on his guard by his knowledge of the wife's weakness.¹¹²

Where a woman induces a man with whom she has had illicit intercourse to marry her by falsely representing to him that she is pregnant by him, when in fact she is not pregnant,¹¹³ or is pregnant by another,¹¹⁴ he cannot have the marriage annulled for fraud. In this case, also, the man is put on his guard by knowledge of the woman's unchastity.

The fraudulent concealment by one of the parties of the fact that he or she is afflicted with an incurable venereal disease is a sufficient ground for avoiding the marriage. Such a condition is, in effect, equivalent to impotency.¹¹⁵

It seems that fraud not sufficient of itself to constitute a ground for avoiding the marriage may have this

¹¹² *Crehore v. Crehore*, 97 Mass. 330, 93 Am. Dec. 98; *Seilheimer v. Seilheimer*, 40 N. J. Eq. 412.

¹¹³ *Fairchild v. Fairchild*, 43 N. J. Eq. 473, 11 Atl. 426. See, also, *Hoffman v. Hoffman*, 30 Pa. 417; *Todd v. Todd*, 149 Pa. 60, 24 Atl. 128, 17 L. R. A. 320.

¹¹⁴ *Franke v. Franke* (Cal.) 31 Pac. 571, 18 L. R. A. 375; *Foss v. Foss*, 12 Allen (Mass.) 26; *States v. States*, 37 N. J. Eq. 195. See, also, *Sissung v. Sissung*, 65 Mich. 168, in which the court was equally divided on this question. In two early cases, a marriage was dissolved at the suit of the husband where both the parties were white, and the child, which was born before marriage, was a mulatto. *Scott v. Shufeldt*, 5 Paige (N. Y.) 43; *Barden v. Barden*, 14 N. C. (3 Dev.) 548. See, also, *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 63.

¹¹⁵ *Smith v. Smith*, 171 Mass. 404, 50 N. E. 933, 68 Am. St. Rep. 440; *Ryder v. Ryder*, 66 Vt. 158, 28 Atl. 1029, 44 Am. St. Rep. 833. It is otherwise, however, if the disease is not contagious and will yield to treatment. *Vondal v. Vondal*, 175 Mass. 383, 56 N. E. 586, 78 Am. St. Rep. 502.

effect when combined with other circumstances, such as the youth or mental weakness of the party defrauded.¹¹⁶

The fraud for which a marriage may be annulled must be such a fraud as operates upon one or the other of the immediate parties to the marriage. Third persons who are defrauded by a marriage cannot have it set aside. Thus, creditors whose rights are defeated by the marriage of their debtor cannot have the marriage annulled, although the sole object of the marriage was to defeat their claims.¹¹⁷

§ 24. Same—Whether void or voidable.

The authorities are conflicting as to whether a marriage procured by fraud is void or voidable. Thus, Chancellor Kent says: "A marriage procured by force or fraud is also void *ab initio*, and may be treated as null by every court in which its validity may be incidentally drawn in question."¹¹⁸ This, however, according to the later authorities, is not correct. The better view is that such marriages are merely voidable at the suit of the party defrauded, who, upon discovery of the fraud, may elect to disaffirm or ratify the marriage. The party who commits the fraud cannot disaffirm the marriage, and is bound by it unless the other party elects to disaffirm.¹¹⁹

¹¹⁶ See 1 Bishop, Mar., Div. & Sep. §§ 494, 495; *Orchardson v. Co-field*, 171 Ill. 14, 49 N. E. 197, 63 Am. St. Rep. 211, 40 L. R. A. 256; *Lewis v. Lewis*, 44 Minn. 124, 46 N. W. 323, 20 Am. St. Rep. 559.

¹¹⁷ *McKinney v. Clarke*, 2 Swan (Tenn.) 321, 58 Am. Dec. 59.

¹¹⁸ 2 Kent, Comm. 76. See, also, *Schouler*, Dom. Rel. § 23.

¹¹⁹ *Farley v. Farley*, 94 Ala. 501, 10 So. 646, 33 Am. St. Rep. 141,

§ 25. Same—Consummated and nonconsummated marriages distinguished.

There is a tendency at present to set aside a marriage for fraud more readily where the marriage has not been physically consummated than where there has been consummation. This distinction rests upon the soundest reasons. If the defrauded party discovers the fraud before the marriage is consummated, and thereafter refuses to cohabit, it is plain that the considerations of public policy against the dissolution of marriage are entitled to far less weight than where the marriage has been followed by cohabitation. In legal contemplation, the parties are indeed husband and wife as soon as the marriage ceremony is performed, but until the marriage is consummated, the new relation assumed by them is inchoate and incomplete, and their status is analogous to that of parties to an executory contract. The evil that might result, therefore, to the parties and the community from a dissolution of the marriage tie is much less than it would be if the marriage had been consummated, or than might reasonably be expected from the continuance of a relation so inauspiciously begun. By the setting aside of the marriage,—a mere formal ceremony of no particular consequence in itself,—the parties may be placed practically *in statu quo*,—a thing which would be impossible if the marriage had been followed by cohabitation.¹²⁰

Woodruff, Cas. 59; *Tompert v. Tompert*, 13 Bush (Ky.) 326, 26 Am. Rep. 197; note in 79 Am. St. Rep. 371.

¹²⁰ 1 Bishop, Mar., Div. & Sep. §§ 456, 461-466; *Smith v. Smith*, 171 Mass. 404, 50 N. E. 933. 68 Am. St. Rep. 440. In this case the

§ 26. Same—Liability for fraudulently procuring marriage.

A person who fraudulently induces another to contract with him or her a marriage known to the party committing the fraud, but not to the other party, to be illegal, is liable in damages to the party so deceived.¹²¹ Thus, it has been so held where a man induced a woman to marry him when he was incompetent to marry because prohibited by a decree divorcing him from a for-

court, in considering when a contract of marriage should be deemed to be executed, said: "Clearly it is executory up to the time of the ceremony. Viewed in its legal aspect, it becomes a binding marriage as soon as the ceremony is performed; but the full execution of the contract contemplated by the parties in their original agreement is then just beginning, and is to continue during their joint lives. Their status up to the time of the ceremony is that of parties to an executory contract. Their status as soon as the ceremony is performed is that of persons legally married, who, with the sanction and under the forms of the law, have assumed new relations to each other and to the state. But these new relations are then rather inchoate than complete, and they do not assume their perfected form, so as to have their full possible effect upon the parties and the community, until consummation of the marriage. There are, therefore, reasons why a fraud like that in the present case, discovered before consummation of the marriage, and at once made a ground for separation, should move the court more strongly in favor of the libelant than if the discovery had come later. The reluctance of the court to recognize such frauds as a ground for legal proceedings is founded upon considerations of public policy. These considerations are much less weighty in a case like the present than if the parties had cohabited for a considerable time before the proceedings were commenced. Although in many cases the distinction between consummated and unconsummated marriages in proceedings for separation has been overlooked, it is distinctly recognized in *Lyndon v. Lyndon*, 69 Ill. 43, and *Robertson v. Cole*, 12 Tex. 356, in each of which cases a decree of nullity was entered when the court said that the ground would have been insufficient if the marriage had been consummated." See, also, in support of the text, *Clark v. Field*, 13 Vt. 460.

¹²¹ Cooley, Torts (2d Ed.) 279.

mer wife,¹²² or because he had a lawful wife living.¹²³ It seems, however, that a fraud on the marriage rendering it voidable, such as concealed impotency on the part of the man, or concealed pregnancy on the part of the woman, affords no ground for an action at common law.¹²⁴ But a man who, by falsely representing that a woman pregnant by him is virtuous, induces another to marry her, is liable to the husband for the fraud.¹²⁵ Of course a person who knowingly contracts a void marriage has no ground of complaint. Thus, where a woman who knew that a divorce from her husband was void married another man, from whom she contracted a venereal disease, it was held that she had no right of action for the injury.¹²⁶

§ 27. Marriage entered into by mistake.

The case of error or mistake is closely allied to fraud, for a person could hardly fall into such a mistake in marrying as would invalidate the marriage unless a fraud were practiced upon him. The most obvious ex-

¹²² *Blossom v. Barrett*, 37 N. Y. 434, 97 Am. Dec. 747. In this case it was held that the woman might recover damages for the fraud without first having the marriage annulled, it being void.

¹²³ *Pollock v. Sullivan*, 53 Vt. 507; *Morrill v. Palmer*, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411. In *Withee v. Brooks*, 65 Me. 14, it was held that, by virtue of a state statute, the right of action survived, and might be asserted against the man's personal representative after his death; but such cause of action does not survive at common law. *Grim v. Carr*, 31 Pa. 533. In *Cooper v. Cooper*, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721, it was held that the deceived woman could not recover from the man's administrator for her services rendered to the deceased while living with him as his wife. But see *Higgins v. Breen*, 9 Mo. 493.

¹²⁴ *Cooley*, Torts (2d Ed.) 279.

¹²⁵ *Kujec v. Goldman*, 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156.

¹²⁶ *Deeds v. Strode*, 6 Idaho, 317, 55 Pac. 656, 96 Am. St. Rep. 263.

ample of error invalidating a marriage is where a party marries one person thinking he or she is marrying another. Thus, if A marries B thinking B is C, and intending to marry C, the marriage is void. But if A marries B, intending to marry B, but thinking that B is C, the marriage is valid.¹²⁷

IV. EXPRESSION OF CONSENT—HOW MARRIAGE IS EFFECTED.

§ 28. In general.

To constitute a valid marriage there must not only be parties competent and willing to consent thereto, but such consent must be expressed in some form which the law will recognize. We shall examine the manner of entering into the marriage relation both at common law and under statutes.

§ 29. The agreement to marry—Breach of promise.

The marriage relation, as we have seen, is founded upon a contract.¹²⁸ This contract, commonly known as the "engagement," is, of course, the first step towards marriage. The contract to marry is, in the main, subject to the same rules as ordinary contracts, with such differences as grow out of the peculiar nature of the agreement.¹²⁹ Unlike many ordinary contracts, this contract cannot be specifically enforced. If either party refuses to perform, the only remedy at law the other party has is an action for damages for breach of the promise.¹³⁰ In order to entitle the plaintiff in such ac-

¹²⁷ See 1 Bishop, Mar., Div. & Sep. §§ 524-537.

¹²⁸ See ante, § 4.

¹²⁹ See *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

¹³⁰ The specific performance of agreements to marry was for-

tion to recover, the contract must, of course, be binding.¹³¹ In the first place, the parties must be competent to contract. Thus, an infant, though above the age of consent, is not bound by a promise of marriage,¹³² though he may sue thereon if the promisor is an adult, the contract being voidable merely, and not void.¹³³ There must have been a mutual promise to marry, an offer or promise of marriage by one party, and an acceptance or promise in return by the other;¹³⁴ but the agreement need not be in any particular form,¹³⁵ nor need it be directly proved,—it may be inferred from the conduct of the parties towards each other.¹³⁶ The

merly decreed in England by the spiritual courts, which compelled a celebration of the marriage in facie ecclesiae, but this jurisdiction was taken away by statute in 1753. The common-law courts entertained actions for damages for breach of the contract from an early date. See *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385. And see, generally, as to action for breach of promise, 4 Am. & Eng. Enc. Law (2d Ed.) 882, and note in 63 Am. Dec. 532.

¹³¹ A contract to marry must satisfy the legal requirements as to parties, consideration, etc., which other contracts must satisfy. *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749, *Woodruff*, Cas. 5.

¹³² *Hunt v. Peake*, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; *Rush v. Wick*, 31 Ohio St. 521, 27 Am. Rep. 523.

¹³³ *Cannon v. Alsbury*, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709; *Willard v. Stone*, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496. To sustain an action on the promise, the infant plaintiff need not aver or prove the consent of parent or guardian to the marriage. *Cannon v. Alsbury*, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709.

¹³⁴ *Burnham v. Cornwell*, 16 B. Mon. (Ky.) 284, 63 Am. Dec. 529; *Russell v. Cowles*, 15 Gray (Mass.) 582, 77 Am. Dec. 391; *Yale v. Curtiss*, 151 N. Y. 598, 45 N. E. 1125; *Weaver v. Bachert*, 2 Pa. 80, 44 Am. Dec. 159.

¹³⁵ *Homan v. Earle*, 53 N. Y. 267; *Woodruff*, Cas. 3; *Yale v. Curtiss*, 151 N. Y. 598, 45 N. E. 1125. The promise need not be express. *Hotchkiss v. Hodge*, 38 Barb. (N. Y.) 117.

¹³⁶ *Burnham v. Cornwell*, 16 B. Mon. (Ky.) 284, 63 Am. Dec. 529;

promise is not an "agreement made in consideration of marriage," within the statute of frauds, and so need not be in writing,¹³⁷ unless it is not to be performed within one year, in which case it must be in writing.¹³⁸ If, however, it may or may not be performed within a year, it need not be in writing.¹³⁹ The promise must be for a consideration, the mutual promises being the usual and a sufficient consideration.¹⁴⁰ As in the case of other contracts, an immoral consideration is not sufficient. Thus, a promise to marry in consideration of future sexual intercourse is void;¹⁴¹ but intercourse before¹⁴² or after¹⁴³ the promise does not affect it. The

Wightman v. Coates, 15 Mass. 1, 8 Am. Dec. 77; Kelly v. Riley, 106 Mass. 339, 8 Am. Rep. 336, Woodruff, Cas. 10; Perkins v. Hersey, 1 R. I. 493, Woodruff, Cas. 1; Hotchkins v. Hodge, 38 Barb. (N. Y.) 117; Munson v. Hastings, 12 Vt. 346, 36 Am. Dec. 345. The conduct and acts relied on to prove the contract must be something more than those characteristic of mere friendship or even courtship. Walmsley v. Robinson, 63 Ill. 41, 14 Am. Rep. 111; Burnham v. Cornwell, 16 B. Mon. (Ky.) 284, 63 Am. Dec. 529; Yale v. Curtiss, 151 N. Y. 598, 45 N. E. 1125; Munson v. Hastings, 12 Vt. 346, 36 Am. Dec. 345. See, generally, as to proof of the contract, Cates v. McKinney, 48 Ind. 562, 17 Am. Rep. 768; Russell v. Cowles, 15 Gray (Mass.) 582, 77 Am. Dec. 391; Green v. Spencer, 3 Mo. 225, 26 Am. Dec. 672; Homan v. Earle, 53 N. Y. 267, Woodruff, Cas. 3; Yale v. Curtiss, 151 N. Y. 598, 45 N. E. 1125; Wetmore v. Mell, 1 Ohio St. 26, 59 Am. Dec. 607.

¹³⁷ Withers v. Richardson, 5 T. B. Mon. (Ky.) 94, 17 Am. Dec. 44.

¹³⁸ Nichols v. Weaver, 7 Kan. 373. Contra, Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

¹³⁹ Lawrence v. Cooke, 56 Me. 187, 96 Am. Dec. 443; Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

¹⁴⁰ Millward v. Littlewood, 5 Exch. 775; Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; Hotchkins v. Hodge, 38 Barb. (N. Y.) 117; Weaver v. Bachert, 2 Pa. 80, 44 Am. Dec. 159.

¹⁴¹ Hanks v. Naglee, 54 Cal. 51, 35 Am. Rep. 67; Burke v. Shaver, 92 Va. 345, 23 S. E. 749, Woodruff, Cas. 5.

¹⁴² Hotchkins v. Hodge, 38 Barb. (N. Y.) 117.

promise must be definite,¹⁴⁴ but it may be upon reasonable conditions or contingencies, not contrary to law or opposed to public policy.¹⁴⁵ Where no time for performance of the promise is agreed upon, it is construed to be a promise to be performed in a reasonable time.¹⁴⁶

To support an action there must, of course, have been a breach of the contract by the defendant.¹⁴⁷ A renunciation of the contract, without justification, before the time fixed for performance,¹⁴⁸ or, where no time is set,

¹⁴³ *Spellings v. Parks*, 104 Tenn. 351, 58 S. W. 126. On the contrary, seduction after and on the faith of the promise may be shown in aggravation of the damages. See note 173, *infra*.

¹⁴⁴ See *Brown v. Odill*, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660.

¹⁴⁵ *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385. A promise by a man to marry a woman as soon as her business is settled is conditional, and no liability arises thereon until the condition is satisfied. *Cole v. Cottingham*, 8 Car. & P. 75, 34 E. C. L. 618. The promise of a married man to marry within a reasonable time after a divorce should be decreed between himself and his wife in a suit then pending is contrary to public policy, and void, and no action can be maintained upon it. *Noice v. Brown*, 38 N. J. Law, 228, 20 Am. Rep. 388, 39 N. J. Law, 133, 23 Am. Rep. 213. And a promise to marry after the death of a living husband or wife would also doubtless be void. See *Millward v. Littlewood*, 5 Exch. 775; *Paddock v. Robinson*, 63 Ill. 99, 14 Am. Rep. 112. But a contract to marry after the death of a divorced wife is sufficiently definite, and is valid where no legal impediment to an immediate marriage exists. *Brown v. Odill*, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660.

¹⁴⁶ *Burks v. Shain*, 2 Bibb (Ky.) 341, 5 Am. Dec. 616; *Bennett v. Beam*, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442.

¹⁴⁷ *Kelly v. Renfro*, 9 Ala. 325, 44 Am. Dec. 441. The defendant's marriage to another woman constitutes a breach. *Brown v. Odill*, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660.

¹⁴⁸ *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 208; *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; *Burtis v. Thompson*, 42 N. Y. 246,

a refusal to perform, upon request, after a reasonable time,¹⁴⁹ constitutes a breach, and gives an immediate right of action. A request for or tender of performance by the plaintiff is not necessary where the defendant has renounced the contract,¹⁵⁰ but it is otherwise where no time is fixed for performance, and the defendant has not plainly repudiated his promise.¹⁵¹

The defense¹⁵² to an action may be either that the contract was not binding in the first instance,¹⁵³ or that a refusal to perform was justified. Thus, fraud which would invalidate an ordinary contract is a good defense to an action upon a contract to marry, although it might not be sufficient to avoid a marriage.¹⁵⁴ False representations and fraudulent concealments by the plaintiff, or by a third person on her behalf and with her knowledge,¹⁵⁵ as to her character¹⁵⁶ or social position and for-

1 Am. Rep. 516; *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749, Woodruff, Cas. 5.

¹⁴⁹ See cases cited in notes 146 and 151.

¹⁵⁰ *Willard v. Stone*, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496, and cases cited in note 139, *supra*. No tender by plaintiff is necessary where the defendant has absconded. *Johnson v. Caulkins*, 1 Johns. Cas. (N. Y.) 116, 1 Am. Dec. 102.

¹⁵¹ *Burks v. Shain*, 2 Bibb (Ky.) 341, 5 Am. Dec. 616; *Burnham v. Cornwell*, 16 B. Mon. (Ky.) 284, 63 Am. Dec. 529.

¹⁵² As to defense, see, generally, note in 40 Am. St. Rep. 172.

¹⁵³ As, for example, because the defendant was an infant, or because the particular contract was void under the statute of frauds, or because contrary to public policy.

¹⁵⁴ See *ante*, § 23, note 98.

¹⁵⁵ *Foote v. Hayne*, 1 Car. & P. 545, 12 E. C. L. 313. See, also, *Wharton v. Lewis*, 1 Car. & P. 529, 12 E. C. L. 305.

¹⁵⁶ *Foote v. Hayne*, 1 Car. & P. 545, 12 E. C. L. 313. It is a good defense that the plaintiff fraudulently concealed the fact that before the promise she had borne a bastard child. *Bell v. Eaton*, 28 Ind. 468, 92 Am. Dec. 329.

tune,¹⁵⁷ may constitute a defense.¹⁵⁸ But it is not the duty of a person, before making or accepting an offer of marriage, to communicate or disclose all of his or her traits of character or circumstances of life; it is rather the duty of the other party to satisfy himself or herself in these matters before entering into the engagement. If the engagement is made without investigation, it will ordinarily be binding, notwithstanding the subsequent discovery of facts which, if known at the time, would have prevented it.¹⁵⁹ But while no disclosure may be necessary, a partial disclosure, or a willful suppression or concealment of material facts, is such fraud as constitutes a defense.¹⁶⁰ Moreover, there are

¹⁵⁷ *Wharton v. Lewis*, 1 Car. & P. 529, 12 E. C. L. 305.

¹⁵⁸ For a note on express and implied representations in a contract to marry, see 44 Am. St. Rep. 381. See, also, note in 26 L. R. A. 430.

¹⁵⁹ *Beachey v. Brown*, El., Bl. & El. 796, 96 E. C. L. 796; *Van Houten v. Morse*, 162 Mass. 414, 38 N. E. 705, 44 Am. St. Rep. 373, 26 L. R. A. 430, *Woodruff*, Cas. 14; *Gring v. Lerch*, 112 Pa. 244, 56 Am. Rep. 314. The fact that the plaintiff, unknown to the defendant, had some negro blood in her veins, or had mercenary motives, or was wanting in affection, or that there was an incompatibility resulting from disparity of age, or difference in character and disposition, will not justify the defendant in breaking the engagement, in the absence of fraud. *Van Houten v. Morse*, 162 Mass. 414, 38 N. E. 705, 44 Am. St. Rep. 373, 26 L. R. A. 430, *Woodruff*, Cas. 14. It is no defense that, before the promise, the plaintiff had been insane and confined in an asylum, provided she was sane at the time of the promise. *Baker v. Cartwright*, 10 C. B. (N. S.) 124, 100 E. C. L. 124. In this case the court said that want of chastity is the only exception to the binding effect of the promise. This is an extreme position.

¹⁶⁰ *Van Houten v. Morse*, 162 Mass. 414, 38 N. E. 705, 44 Am. St. Rep. 373, 26 L. R. A. 430, *Woodruff*, Cas. 14.

some circumstances which must be disclosed. Thus, a man has a right to presume that the woman is physically capable of matrimonial intercourse, and her concealment of the fact of her incapacity is a good defense to an action on the promise.¹⁶¹ So, also, want of chastity on the part of the woman, if unknown to the man at the time of the promise, justifies him in breaking his promise on discovery of the fact, and constitutes a good defense.¹⁶² It is otherwise, however, if her unchastity was known to him when the promise was made.¹⁶³ The fact that the plaintiff, at the time of the promise, was engaged to a third person, is no defense, although unknown to the defendant.¹⁶⁴

The physical condition of the defendant, rendering him unfit for marriage, may in some circumstances be a good defense to an action for breach of promise. Thus, a man who, having been afflicted with a loathsome disease, agrees to marry, believing that his disease is cured or curable, is justified in breaking the engagement upon afterwards discovering that the disease still exists and is incurable.¹⁶⁵ So, also, a disease rendering it improper or unsafe to marry, contracted or developed after the agreement, without fault, justifies a postpone-

¹⁶¹ *Gring v. Lerch*, 112 Pa. 244, 56 Am. Rep. 314.

¹⁶² *Foster v. Hanchett*, 68 Vt. 319, 35 Atl. 316, 54 Am. St. Rep. 887.

¹⁶³ *Bowman v. Bowman*, 153 Ind. 498, 55 N. E. 422.

¹⁶⁴ *Beachey v. Brown, El., Bl. & El.* 796, 96 E. C. L. 796; *Roper v. Clay*, 18 Mo. 383, 59 Am. Dec. 314.

¹⁶⁵ *Shackleford v. Hamilton*, 93 Ky. 80, 19 S. W. 5, 40 Am. St. Rep. 166, 15 L. R. A. 531; *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444.

ment or refusal to perform the contract, according to the character of the disease as curable or permanent.¹⁶⁶

Of course, the fact that the contract had been rescinded by mutual consent constitutes a good defense.¹⁶⁷

The fact that the defendant, at the time of the promise, was not competent to marry, is not necessarily a defense.¹⁶⁸ Thus, the fact that, unknown to the plaintiff, the defendant was already married at the time of the promise, is no defense.¹⁶⁹ In this case the wrong con-

¹⁶⁶ Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 81 Am. St. Rep. 302, 51 L. R. A. 854; Sanders v. Coleman, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581. See, contra, Hall v. Wright, EL., BL. & EL. 746, 96 E. C. L. 746, and Smith v. Compton, 67 N. J. Law, 548, 52 Atl. 386, 58 L. R. A. 480.

¹⁶⁷ Mabin v. Webster, 129 Ind. 430, 28 N. E. 863, 28 Am. St. Rep. 199. But the mere return of the engagement ring by the plaintiff after the defendant had broken the engagement does not constitute a rescission by the plaintiff. Kraxberger v. Roiter, 91 Mo. 404, 3 S. W. 872, 60 Am. Rep. 262.

¹⁶⁸ In several cases it has been held that no action could be maintained for the breach of a contract to marry, where the defendant was not competent to marry, the promise in such case being considered contrary to public policy, and therefore void. Thus it has been so held where the defendant was impotent (Gulick v. Gulick, 41 N. J. Law, 13), or was a divorced person, forbidden to marry again (Haviland v. Halstead, 34 N. Y. 643), or where the parties were within the prohibited degrees of relationship,—nephew and aunt (Campbell v. Crampton, 18 Blatchf. [U. S.] 150, 8 Abb. N. C. [N. Y.] 363); but kinship not within the prohibited degrees is no defense, nor even matter in mitigation of damages (Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584). In all of these cases, however, the plaintiff knew of the disability, though this fact does not seem to have particularly influenced the if celebrated, would have been valid. Campbell v. Crampton, 18 court. An agreement to marry between persons nearly related may be contrary to public policy and void, although the marriage itself, Blatchf. (U. S.) 150, 8 Abb. N. C. (N. Y.) 363. See this case for a discussion of the subject of conflict of laws in respect to contracts to marry.

¹⁶⁹ Millward v. Littlewood, 5 Exch. 775; Kelley v. Riley, 106

sists, of course, not in the breach of the promise, which was unavoidable, but in the defendant's fraud in making a promise which he knew he could not perform. But no action can be maintained upon the promise if the plaintiff knew at the time that the defendant was married.¹⁷⁰

The damages awarded for breach of promise of marriage should include just compensation for the benefits lost by the breach, as well as for the mental suffering and the humiliation endured by the plaintiff. In estimating such damages the social condition, fortune, character and conduct of the parties, and all the circumstances of the case should be taken into consideration.¹⁷¹

Mass. 339, 8 Am. Rep. 336, Woodruff, Cas. 10; Coover v. Davenport, 1 Heisk. (Tenn.) 368, 2 Am. Rep. 706; Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702, Woodruff, Cas. 13.

¹⁷⁰ Drennan v. Douglass, 102 Ill. 341, 40 Am. Rep. 595; Paddock v. Robinson, 63 Ill. 99, 14 Am. Rep. 112. In the case last cited, both parties were married, and each knew the other to be so.

¹⁷¹ Holloway v. Griffith, 32 Iowa, 409, 7 Am. Rep. 208; Lawrence v. Cooke, 56 Me. 187, 96 Am. Dec. 443; Bennett v. Beam, 42 Mich. 346, 36 Am. Rep. 442; Hahn v. Bettingen, 84 Minn. 513, 88 N. W. 10, 50 L. R. A. 669; Green v. Spencer, 3 Mo. 225, 26 Am. Dec. 672; Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 81 Am. St. Rep. 302, 51 L. R. A. 854; Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784; Allen v. Baker, 86 N. C. 91, 41 Am. Rep. 444; Perkins v. Hersey, 1 R. I. 493, Woodruff, Cas. 1; Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660; Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. Rep. 908; Dent v. Pickens, 34 Va. 240, 12 S. E. 698, 26 Am. St. Rep. 921. The plaintiff's anxiety of mind is an element to be considered. Tobin v. Shaw, 45 Me. 331, 71 Am. Dec. 547. The plaintiff cannot recover for loss sustained by reason of her own wrongful act in breaking an engagement with another man in order to marry defendant. Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 74, 81 Am. St. Rep. 302, 51 L. R. A. 854; Hahn v. Bettingen, 84 Minn. 513, 88 N. W. 10, 50 L. R. A. 669.

Exemplary or punitive damages may be awarded in a proper case.¹⁷² And the damages may be aggravated by certain circumstances, such as the seduction of the plaintiff on the faith of the promise,¹⁷³ or a wanton and unsuccessful attack on the plaintiff's character by way of defense,¹⁷⁴ or other circumstances. On the other hand, the amount of damages may be reduced by circumstances in mitigation, such as the plaintiff's bad character or conduct before or after the promise or breach thereof.¹⁷⁵ But the mere fact that since the breach the plaintiff's feelings towards the defendant

¹⁷² Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Coryell v. Colbaugh, 1 N. J. Law, 77, 1 Am. Dec. 192; Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784. But see Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 81 Am. St. Rep. 302, 51 L. R. A. 854.

¹⁷³ Whalen v. Layman, 2 Blackf. (Ind.) 194, 18 Am. Dec. 157; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Sauer v. Schulenberg, 33 Md. 288, 3 Am. Rep. 174; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336, Woodruff, Cas. 10; Bennett v. Beam, 42 Mich. 346, 36 Am. Rep. 442; Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672; Roper v. Clay, 18 Mo. 383, 59 Am. Dec. 314; Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. Rep. 908. Contra, Weaver v. Bachert, 2 Pa. 80, 44 Am. Dec. 159; Perkins v. Hersey, 1 R. I. 493, Woodruff, Cas. 1. See, also, Cates v. McKinney, 48 Ind. 562, 17 Am. Rep. 768; Burks v. Shain, 2 Bibb (Ky.) 341, 5 Am. Dec. 616.

¹⁷⁴ Lawrence v. Cooke, 56 Me. 187, 96 Am. Dec. 443. But not where the attack was made in good faith. White v. Thomas, 12 Ohio St. 312; Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584.

¹⁷⁵ Johnson v. Caulkins, 1 Johns. Cas. (N. Y.) 116, 1 Am. Dec. 102; Willard v. Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584. See, also, McKee v. Nelson, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384. This grows out of the fact that injury to the plaintiff's reputation is one element to be considered in estimating damages; but the defendant cannot avail himself of the plaintiff's bad reputation growing out of her improper relations with himself. Boynton v. Kellogg, 3 Mass. 189, 3 Am. Dec. 122.

have changed from affection to dislike, and she is no longer willing to marry him, is not a circumstance in mitigation.¹⁷⁶ The fact that the defendant is afflicted with an incurable disease,¹⁷⁷ or that his motives and conduct in breaking the engagement have not been bad,¹⁷⁸ may be shown in mitigation.

The question as to the amount of damages is left very largely to the jury. And their verdict will not be disturbed unless they were influenced by passion or prejudice, or were misled by improper instructions from the court, or the damages were flagrantly excessive.¹⁷⁹

An action for breach of promise is essentially a personal action, and abates on the death of the defendant. It cannot be brought, continued, or revived against his personal representatives,¹⁸⁰ unless, as is sometimes the case, the right is preserved by statute.¹⁸¹ So, also, an

¹⁷⁶ *Miller v. Hayes*, 34 Iowa, 497; *Bennett v. Beam*, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442.

¹⁷⁷ *Mabin v. Webster*, 129 Ind. 430; 28 N. E. 863, 28 Am. St. Rep. 199. But see *Smith v. Compton*, 67 N. J. Law, 548, 52 Atl. 386, 58 L. R. A. 480.

¹⁷⁸ *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561.

¹⁷⁹ *White v. Thomas*, 12 Ohio St. 312, 80 Am. Dec. 347; *Daggett v. Wallace*, 75 Tex. 352, 13 S. W. 49, 16 Am. St. Rep. 908; and cases cited in note 171, *supra*.

¹⁸⁰ *Stebbins v. Palmer*, 1 Pick. (Mass.) 71, 11 Am. Dec. 146, Woodruff, Cas. 20; *Hayden v. Vreeland*, 37 N. J. Law, 372, 18 Am. Rep. 723; *Wade v. Kalbfleisch*, 58 N. Y. 282, 17 Am. Rep. 250; *Weeks v. Russell*, 87 Tenn. 442, 3 L. R. A. 212; *Grubb v. Sult*, 32 Grat. (Va.) 203, 34 Am. Rep. 765. See, also, *Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336, Woodruff, Cas. 10. The action will possibly survive where special damage is alleged and proved. See *Stebbins v. Palmer*, 1 Pick. (Mass.) 71, 11 Am. Dec. 146; *Grubb v. Sult*, 32 Grat. (Va.) 203, 34 Am. Rep. 765.

¹⁸¹ *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444.

administrator cannot maintain an action for a breach of promise to his intestate, where no special damage is alleged.¹⁸²

The action abates, also, upon the intermarriage of the parties;¹⁸³ but a mere offer of marriage by the defendant after suit brought does not defeat the suit. It constitutes no defense, and ordinarily is not even matter to be considered in mitigation of damages.¹⁸⁴ And an offer made after breach, but before suit, is also no defense, though it may be a circumstance in mitigation.¹⁸⁵

§ 30. Marriage at common law.

By the canon law, the consent of the two parties, expressed in words of present mutual acceptance, constituted, without more, an actual and legal marriage.¹⁸⁶ And such informal consent constituted at common law in England what was substantially a marriage, and the parties might be compelled in the spiritual courts to perfect it by a celebration *in facie ecclesiae*,—that is, by a person in holy orders.¹⁸⁷ But in England the subject has been regulated by statute since 1753. In Scotland it was decided in the great case of *Dalrymple v.*

¹⁸² *Chamberlain v. Williamson*, 2 Maule & S. 408.

¹⁸³ *Harris v. Tyson*, 63 Ga. 629, 36 Am. Rep. 126.

¹⁸⁴ *Holloway v. Griffith*, 32 Iowa. 409, 7 Am. Rep. 208; *Bennett v. Beam*, 42 Mich. 346, 36 Am. Rep. 442.

¹⁸⁵ *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275. But an offer to marry, made in good faith, before a definite breach of the contract, is a good defense. *Kelly v. Renfro*, 9 Ala. 325, 44 Am. Dec. 441.

¹⁸⁶ *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54.

¹⁸⁷ 1 Bl. Comm. 432. For a learned review of the canon law and the English law of marriage prior to the act of 1753 (26 Geo. II. c. 33), see *Denison v. Denison*, 35 Md. 361.

Dalrymple (1811)¹⁸⁸ that such informal marriages were valid. But in 1844, the house of lords, on an appeal from Ireland, held by an equally divided court that a marriage not celebrated by a person in holy orders (i. e., an Episcopal clergyman) was void.¹⁸⁹ This decision has been severely criticised and frequently disproved.¹⁹⁰

When the colonists came to America, bringing with them so much of the English law as they found applicable to their new situation, they usually had with them no persons in holy orders, and hence the requirement that marriages be celebrated by such persons, however it may have been in England, could not have been a part of the common law in this country, except possibly

¹⁸⁸ *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54.

¹⁸⁹ *Reg. v. Millis*, 10 Clark & F. 534. In this case the defendant, a member of the Church of England, contracted two marriages, the first being celebrated in Ireland, by a Presbyterian minister, according to the forms of the Presbyterian Church, and the second in England, according to the forms of the Church of England. He was prosecuted for bigamy, the question being whether his first marriage, not having been celebrated according to the rites of the Church of England, was valid. The lower court, by their unanimous opinion, held that the first marriage was invalid, and declared that, "by the law of England as it existed at the time of the passing of the marriage act [1753], a contract of marriage per verba de praesenti was a contract indissoluble between the parties themselves, affording to either of the contracting parties, by application to the spiritual court, the power of compelling the solemnization of an actual marriage, but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders." The entire learning of the subject is exhausted in this case, and the subsequent case of *Beamish v. Beamish*, 9 H. L. Cas. 274. By statute now in Great Britain, marriages may be celebrated otherwise than by the rites of the Established Church.

¹⁹⁰ See 1 Bishop, Mar., Div. & Sep. § 400 et seq.

where the English religious conditions were reproduced.¹⁹¹ It is held, therefore, in this country, by the great weight of authority, that a present agreement between competent parties to take each other for husband and wife constitutes a valid marriage at common law, even if not in the presence of witnesses. No solemnization or particular form or ceremony is required.¹⁹²

The matrimonial consent will ordinarily be expressed verbally; but it would seem that the mode of expression, whether by acts, signs, or words, is immaterial.¹⁹³

¹⁹¹ In *Denison v. Denison*, 35 Md. 361, the court said: "It is true the common law of England has been adopted by the people of this state [Maryland], but only so far as it could be made to fit and adjust itself to our local circumstances and peculiar institutions. The ecclesiastical policy of England forms no part of the common law as we have adopted it. We have in our system no tribunal, as in England, clothed with power and jurisdiction to enforce the solemnization of marriages between parties contracting per verba de praesenti." In this case, however, it was held (following *Reg. v. Millis*, 10 Clark & F. 534) that under the laws of Maryland, to constitute lawful marriage, there must be superadded to the civil contract some religious ceremony.

¹⁹² *Meister v. Moore*, 96 U. S. 76; *Renfrow v. Renfrow*, 60 Kan. 277, 56 Pac. 534, 72 Am. St. Rep. 350; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *People v. Mendenhall*, 119 Mich. 404, 78 N. W. 325, 75 Am. St. Rep. 408; *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359; *University of Michigan v. McGuckin*, 62 Neb. 489, 87 N. W. 180, 57 L. R. A. 917; *Eaton v. Eaton (Neb.)* 92 N. W. 995, 60 L. R. A. 605; *State v. Zichfeld*, 23 Nev. 304, 62 Am. St. Rep. 800; *Atlantic City R. Co. v. Goodin*, 62 N. J. Law, 394, 42 Atl. 333, 72 Am. St. Rep. 652, 45 L. R. A. 671; *Gall v. Gall*, 114 N. Y. 109; *Hilton v. Roylance*, 25 Utah, 129, 69 Pac. 660, 95 Am. St. Rep. 821, 58 L. R. A. 723; *Williams v. Williams*, 46 Wis. 464, 32 Am. Rep. 722; and cases cited in note 195, *infra*.

¹⁹³ It has been said that the matrimonial consent may be expressed by conduct as well as verbally, and that the parties may become husband and wife without exchanging any words on the subject. *University of Michigan v. McGuckin*, 62 Neb. 489, 87 N.

Thus, the marriage of a deaf and dumb person by acts and signs is valid.¹⁹⁴

Text writers and judges have distinguished two forms of marriage at common law, namely, (1) marriage *per verba de presenti*, and (2) marriage *per verba de futuro cum copula*. We shall examine each of these supposed forms separately.

§ 31. Same—Marriage *per verba de presenti*.

A marriage *per verba de presenti* is a marriage effected by the exchange of words of present consent in any form. Thus, if the man says to the woman, "I now take you to be my wife," and she replies, "I now take you to be my husband," they are married at common law, without any further ceremony. The parties may so marry themselves without license, officiating minister, or other officer, and without witnesses. No third

W. 180, 57 L. R. A. 917. In this case the court said: "The ultimate fact is not that the parties made a formal promise or contract, but that they mutually consented to a social relation. This consent may be expressed by conduct as effectively as by words, and proof of the conduct is proof of the consent." As an abstract proposition, this is doubtless true, but it is difficult to conceive how two persons capable of speech could enter upon so important a relationship without at least a verbal agreement to do so. At the same time, it is not always possible to establish such agreement by direct proof, and it is well settled that it may be implied, or, more properly, inferred, from their conduct. See *Renfrow v. Renfrow*, 60 Kan. 277, 56 Pac. 534, 72 Am. St. Rep. 350; *Francis v. Francis*, 31 Grat. (Va.) 283. And see post, § 51. The only case in which a marriage might be naturally implied from conduct without express words of consent would seem to be where parties who have married while under disability continue to cohabit after the removal of the disability. See post, § 52.

¹⁹⁴ *Harrod v. Harrod*, 1 Kay & J. 4. In this case the court said: "Though our law requires certain formalities to be complied with,

person need be present.¹⁹⁵ So, also, a marriage by a written contract is valid.¹⁹⁶ But the consent must be to a present marriage. Thus, an agreement to cohabit for a time as husband and wife, and then to marry, is not sufficient.¹⁹⁷ Moreover, the consent must be uncon-

such as the publication of banns and the like, as regards the ceremony itself, it has never been held that repetition of the words of the marriage service is necessary. I have certainly known of cases of complete marriages where perhaps it was improper that the marriage should be celebrated, in which the parties, being of the poorer classes, have willfully abstained from making the responses, especially as to obedience on the part of the woman. Swinburne says that any sign of assent is sufficient. When the hands of the parties are joined together, and the clergyman pronounces them to be man and wife, they are married if they understand that by that act they have agreed to cohabit together, and with no other person."

¹⁹⁵ *Hiler v. People*, 156 Ill. 511, 41 N. E. 181, 47 Am. St. Rep. 221; *Blanchard v. Lambert*, 43 Iowa, 288, 22 Am. Rep. 245; *State v. Walker*, 36 Kan. 297, 59 Am. Rep. 556; *Londonderry v. Chester*, 2 N. H. 268, 9 Am. Dec. 61; *Voorhees v. Voorhees*, 46 N. J. Eq. 411, 19 Am. St. Rep. 404; *Fenton v. Reed*, 4 Johns. (N. Y.) 52, 4 Am. Dec. 244; *Hayes v. People*, 25 N. Y. 390, 82 Am. Dec. 364; *Com. v. Stump*, 53 Pa. 132, 91 Am. Dec. 198; *Richard v. Brehm*, 73 Pa. 140, 13 Am. Rep. 733; *Conly's Estate*, 185 Pa. 208; and cases cited in note number 192, *supra*. "The whole law on the subject is that, to render competent parties husband and wife, they must and need only agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. If cohabitation follows, it adds nothing in law, although it may be evidence of marriage. It is mutual, present consent, lawfully expressed, which makes the marriage." *Mitchell, J.*, in *Hulett v. Carey*, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419, 34 L. R. A. 384, *Woodruff*, Cas. 28.

¹⁹⁶ *People v. Mendenhall*, 119 Mich. 404, 78 N. W. 325, 75 Am. St. Rep. 408; *Hulett v. Carey*, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419, 34 L. R. A. 384, *Woodruff*, Cas. 28; *State v. Bittick*, 103 Mo. 183, 23 Am. St. Rep. 869, 11 L. R. A. 587; *State v. Zichfeld*, 23 Nev. 304, 62 Am. St. Rep. 800.

¹⁹⁷ *Estate of Grimm*, 131 Pa. 199, 18 Atl. 1061, 17 Am. St. Rep.

ditional. Thus, a declaration by a man to a woman with whom he is cohabiting that she is his lawful wife, in the event of a child being born in consequence of their cohabitation, does not constitute a marriage, although a child is born.¹⁹⁸

An agreement to keep the marriage secret does not invalidate it, although the fact of secrecy might be evidence that no marriage ever took place.¹⁹⁹

The marriage need not be followed by cohabitation. By the maxim of the civil law, *Consensus non concubitus facit nuptias*,²⁰⁰ nor is the consummation of the marriage by coition necessary to its validity.²⁰¹

§ 32. Same—Marriage per verba de futuro cum copula.

An agreement to marry at some future time (*per verba de futuro*) does not constitute a marriage. The parties to such an agreement are simply engaged; but, according to the earlier authorities, if the agreement is followed by sexual intercourse, this constitutes a mar-

796, 6 L. R. A. 717; *Peck v. Peck*, 12 R. I. 485, 34 Am. Rep. 702. Where a man and a woman cohabited upon an agreement to marry as soon as they could procure a license, it was held that this did not constitute a marriage. *Robertson v. State*, 42 Ala. 509.

¹⁹⁸ *Stewart v. Menzies*, 2 Rob. App. (Scotch) 547.

¹⁹⁹ *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54; *Hulett v. Carey*, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419, 34 L. R. A. 384.

²⁰⁰ *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54; *Jackson v. Winne*, 7 Wend. (N. Y.) 47, 22 Am. Dec. 563; *Barnett v. Kimmell*, 35 Pa. 13; *Hilton v. Roylance*, 25 Utah, 129, 69 Pac. 660, 95 Am. St. Rep. 821, 58 L. R. A. 723. Cohabitation, however, is strong evidence that consent was exchanged. See post, § 51. In California it is held that an informal marriage without solemnization is not valid unless followed by cohabitation. *Kilburn v. Kilburn*, 89 Cal. 46, 26 Pac. 636, 23 Am. St. Rep. 447.

²⁰¹ *Franklin v. Franklin*, 154 Mass. 515, 26 Am. St. Rep. 266.

riage. This is called a marriage *per verba de futuro cum copula*. A good deal of confusion has arisen from a misunderstanding as to the precise effect of such intercourse. The truth is that it has absolutely nothing to do with making the parties husband and wife. Mere sexual intercourse does not change an engagement into a marriage. That this is true the numerous suits for breach of promise brought by women who have been seduced under promise of marriage abundantly attest. Nevertheless, "where parties competent to contract have agreed to marry at some future time, if they have *copula*, which is lawful only in the married state, in the absence of any evidence to the contrary, they will be presumed to have become actually married by taking each other for husband and wife, and to have changed their future promise to marry to one of present marriage. In such a case, the *copula* will be presumed to have been allowed on the faith of the marriage promise, and that the parties, at the time of such *copula*, accepted each other as man and wife."²⁰² That is to say, the agreement *per verba de futuro* is changed to an agreement *per verba de presenti* before or simultaneously with the *copula*. In other words, the *copula* is evidence

²⁰² Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105. And see, in support of the text, White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; Hiler v. People, 156 Ill. 511, 41 N. E. 181, 47 Am. St. Rep. 221; Voorhees v. Voorhees, 43 N. J. Eq. 411, 19 Am. St. Rep. 404; Cheney v. Arnold, 15 N. Y. 345, 69 Am. Dec. 609; Gall v. Gall, 114 N. Y. 109; Duncan v. Duncan, 10 Ohio St. 181, Woodruff, Cas. 30; Peck v. Peck, 12 R. I. 485, 24 Am. Rep. 702, Woodruff, Cas. 36. A contract of marriage must be *per verba in praesentibus*, but a promise to marry may be *per verba in futuro*. Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709.

of a marriage, but is not itself marriage. If in fact there has been no present agreement, the parties are not married, notwithstanding *copula*. As a practical question, however, when parties live together apparently as man and wife without having been formally married, and there is no evidence that they are not married, they will be presumed in law to be married. This is on the principle that the law always presumes in favor of innocence, which presumption may be rebutted.²⁰³

It will be seen from the foregoing that the distinction between the two forms of marriage is a verbal one only, and there is but one kind in fact, namely, a marriage *per verba de presenti*.

§ 33. Formal marriage—Statutory provisions.

Ordinarily, marriages are celebrated in some formal way, usually by a semireligious service, at which a minister officiates. This, as we have seen, was not necessary under the canon law or at common law. By the decree of the Council of Trent (1563), the canon law was changed, and all marriages not celebrated in the presence of a parish priest and two witnesses were declared void. This decree was never in force in England.²⁰⁴ But by a number of statutes, beginning with the act of 1753, various formalities, such as the publication of banns, procuring a license, the consent of parent or guardian, and solemnization by a clergyman, have been made necessary in England; and a marriage not

²⁰³ See post, § 51.

²⁰⁴ *Beamish v. Beamish*, 9 H. L. Cas. 274.

celebrated as required by the statutes is void.²⁰⁵ In most of the states, statutes authorize certain persons to perform the marriage ceremony, direct the procuring of the license, and the consent of parent or guardian in the case of an infant, and require a certificate of marriage to be returned and recorded, the provisions varying in the different states.

One of the principal objects of such statutes is to preserve evidence of marriages.²⁰⁶ It is generally held that their provisions are directory merely, and that a marriage good at common law, though not celebrated in compliance with the statute, is valid, unless the statute contains express words of nullity.²⁰⁷ This view is the

²⁰⁵ *Reg. v. Millis*, 10 Clark & F. 534; *Beamish v. Beamish*, 9 H. L. Cas. 274.

²⁰⁶ "Their object has manifestly been, not to declare what shall be requisite to the validity of a marriage, but to provide a legitimate mode of solemnizing it. They speak of the celebration of its rite, rather than of its validity, and they address themselves principally to the functionaries they authorize to perform the ceremony. In most cases the leading purpose is to secure a registration of marriages, and evidence by which marriages may be proved,—for example, by certificate of a clergyman or magistrate, or by an exemplification of the registry." Per Strong, J., in *Meister v. Moore*, 96 U. S. 76.

²⁰⁷ *Meister v. Moore*, 96 U. S. 76; *Farley v. Farley*, 94 Ala. 501, 33 Am. Ct. Rep. 141; *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105; *Teter v. Teter*, 101 Ind. 129, 51 Am. Rep. 742; *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245; *State v. Walker*, 36 Kan. 297, 59 Am. Rep. 556; *Renfrow v. Renfrow*, 60 Kan. 277, 56 Pac. 534, 72 Am. St. Rep. 350; *Holmes v. Holmes*, 6 La. 463, 26 Am. Dec. 482; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359; *State v. Bittick*, 103 Mo. 183, 15 S. W. 325, 11 L. R. A. 587; *State v. Zichfeld*, 23 Nev. 304, 62 Am. St. Rep. 800, 34 L. R. A. 784; *London-derry v. Chester*, 2 N. H. 268, 9 Am. Dec. 61; *State v. Robbins*, 28 N. C. (6 Ired.) 23, 44 Am. Dec. 64; *Simon v. State*, 31 Tex. Cr.

one most consistent with the general attitude of the law towards marriage. Marriage is recognized as a natural right, which existed before the statutes. It is favored by the law, and is rather to be promoted than discouraged. Restrictions placed upon it are looked upon with disfavor, and all statutory regulations constituting barriers to marriage should be construed as directory merely if the language used will permit. The legislature has full power to prescribe reasonable regulations relating to marriage, and to impose reasonable restrictions upon the right to marry, and it may provide a punishment for those who solemnize or contract marriages in violation of the statutes; but at the same time it is settled that punishment may be inflicted on those who so disregard the statutory conditions and prohibitions without rendering the marriage itself void.²⁰⁸

In some states the courts, influenced by the peculiar wording of the statutes, or by the general history and intent of the state marriage laws, have held that the provisions of the statutes are mandatory, and that marriages not celebrated in accordance with the statutory requirements are void. In these states there can be no valid "common-law" marriage.²⁰⁹ And in one state—

R. 186, 37 Am. St. Rep. 802; *Thompson v. Nims*, 83 Wis. 261, 53 N. W. 502, 17 L. R. A. 847. For other authorities, see 19 Am. & Eng. Enc. Law (2d Ed.) 1195.

²⁰⁸ *State v. Walker*, 36 Kan. 297, 59 Am. Rep. 556, and other cases cited in note immediately preceding.

²⁰⁹ *Norman v. Norman*, 121 Cal. 620; *Harris v. Harris*, 85 Ky. 49; *Robinson v. Redd's Adm'r*, 19 Ky. L. R. 1422, 43 S. W. 435; *State v. Hodgskins*, 19 Me. 155, 36 Am. Dec. 742; *State v. Bowe*, 61 Me. 171; *Denison v. Denison*, 35 Md. 370; *Milford v. Worcester*, 7 Mass. 48; *Com. v. Munson*, 127 Mass. 459, 34 Am. Rep. 411; *Dunbarton v.*

Maryland—a marriage is not valid unless celebrated by a religious ceremony.²¹⁰

It would seem that a distinction might properly be made between the several requirements of the statutes, some of them being regarded as mandatory, and others as directory merely. Thus, a court holding void a marriage not celebrated by an authorized person might hesitate to set aside a marriage otherwise regular merely because the consent of parents or guardian was not obtained. This point, however, has not been decided.²¹¹

§ 34. Same—The celebrant.

As we have already seen, it is not necessary, by the common law in force in this country, to constitute a valid marriage, that any marriage ceremony be performed. There is therefore no necessity for any celebrant whatever. In England, however, a marriage is not fully perfected at common law unless celebrated *in facie ecclesiae* by a clergyman of the established church.²¹² And in Roman Catholic countries, in which

Franklin, 19 N. H. 257; State v. Wilson, 121 N. C. 650, 28 S. E. 416 (it was formerly otherwise in this state, State v. Robbins, 28 N. C. [6 Ired.] 23, 44 Am. Dec. 64); Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411; Offield v. Davis, 100 Va. 250, 40 S. E. 910; In re McLaughlin's Estate, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 639; Beverlin v. Beverlin, 29 W. Va. 732, 3 S. E. 36 (dictum).

²¹⁰ Fornshill v. Murray, 1 Bland (Md.) 478, 18 Am. Dec. 344; Jackson v. Jackson, 80 Md. 176.

²¹¹ In Norman v. Norman, 121 Cal. 620, 54 Pac. 143, 66 Am. St. Rep. 74, 42 L. R. A. 343, the court, in holding that a marriage celebrated by an unauthorized person was void, said: "We do not think it necessary to decide whether it is mandatory to obtain a license; nor whether the minority of the defendant and want of consent of her parents or guardian would invalidate the marriage."

²¹² See ante. § 33.

marriage is regarded as a sacrament, it is customary to require the presence and benediction of a priest in order to give validity to a marriage.²¹³

In this country the statutes universally designate the persons who may perform the marriage ceremony, such authority being given to clergymen and priests of the various religious denominations, and to various civil officers, such as judges, magistrates, justices of the peace, mayors of cities, etc., the statutes differing somewhat as to the persons so authorized.²¹⁴ By the statutes of England and the acts of congress, consular officers are authorized to celebrate marriages in foreign countries.²¹⁵

A clergyman, in the administration of marriage, is a public civil officer, and does not differ in this capacity from a judge or justice of the peace in the performance of the same duty.²¹⁶ The performance by a clergyman or other officer of the marriage ceremony is *prima facie* proof of his official character and authority, and, in the absence of evidence to the contrary, it will be presumed that he was duly authorized.²¹⁷

The statutes providing for the celebration of mar-

²¹³ Rice v. Rice, 31 Tex. 174.

²¹⁴ See 1 Stimson, Am. St. Law, § 6120. See, generally, as to who may celebrate marriage under various statutes, Jones v. Jones, 18 Me. 308, 36 Am. Dec. 723; Com. v. Munson, 127 Mass. 459, 34 Am. Rep. 411; Londonderry v. Chester, 2 N. H. 268, 9 Am. Dec. 6. State v. Kean, 10 N. H. 347, 34 Am. Dec. 162.

²¹⁵ 55 & 56 Vict. c. 23; U. S. Rev. St. § 4082, 2 Fed. St. Ann. 818; 2 U. S. Comp. St. 2768.

²¹⁶ Goshen v. Stonington, 4 Conn. 209, 10 Am. Dec. 121.

²¹⁷ Goshen v. Stonington, 4 Conn. 209, 10 Am. Dec. 121. See post, § 50.

riages by designated persons, like other statutory regulations of the subject, are generally regarded as directory merely, and the fact that the celebrant was not authorized to perform the ceremony does not affect the validity of the marriage, although it may subject such person to a penalty.²¹⁸ In some states, however, the marriage is held void in such case.²¹⁹ So, also, in some states, a marriage celebrated by the parties themselves, with no officiating clergyman or officer, is void.²²⁰

§ 35. Marriage ceremony without matrimonial intent.

The mere performance of a marriage ceremony does not make the parties husband and wife where they do not in fact intend to become such.²²¹ Thus, a ceremony performed in jest is no marriage, even though performed by a proper officer, who supposes the parties to be in earnest;²²² but if either party is in earnest, the mar-

²¹⁸ *Londonderry v. Chester*, 2 N. H. 268, 9 Am. Dec. 61; *Simon v. State*, 31 Tex. Cr. R. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

²¹⁹ *Norman v. Norman*, 121 Cal. 620, 54 Pac. 143, 66 Am. St. Rep. 74, 42 L. R. A. 343; *Ligonia v. Buxton*, 2 Me. 102, 11 Am. Dec. 46; *State v. Bowe*, 61 Me. 171.

²²⁰ *Milford v. Worcester*, 7 Mass. 48; *Com. v. Munson*, 127 Mass. 459, 34 Am. Rep. 411.

²²¹ "A simple marriage ceremony will not make a man and woman husband and wife. Capacity and consent are absolutely essential, but celebration only contingently so." *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105. In this case the element of capacity was lacking, the man having a wife living.

²²² *McClurg v. Terry*, 21 N. J. Eq. 225. In this case a man and woman, at a social gathering, went through the marriage ceremony, in jest, before a justice of the peace, who was in doubt as to whether the ceremony was in earnest or in jest. In holding the marriage void the court said: "Mere words, without any intention corresponding to them, will not make a marriage or any other civil contract; but the words are the evidence of such intention, and, if

riage is valid and binding. Thus, where a man, with evil intent, fraudulently induces a woman to go through the marriage ceremony before one falsely impersonating a clergyman, the woman being in earnest, and supposing the marriage to be regular, the marriage is valid, unless the party defrauded elects to disaffirm it upon discovering the fraud. The other party is estopped to deny its validity.²²³ This doctrine is expressly affirmed in a number of states by statute. In such case it should be noted that the rule is not that the marriage is valid if affirmed by the party deceived, but that it is valid unless disaffirmed. This may lead to peculiar results. Should the woman so deceived into a mock marriage die without discovering the fraud, the marriage, having never been disaffirmed by her, is valid, and the man may claim marital rights in her property, although he never intended to become her husband, thus profiting by his own fraud.²²⁴

once exchanged, it must be clearly shown that both parties intended and understood that they were not to have effect. In this case the evidence is clear that no marriage was intended by either party."

A somewhat remarkable case in this connection is *Clark v. Field*, 13 Vt. 460, in which it was held that where a marriage ceremony was had under a mistake by the woman as to its legal effect, and was not intended by her to be operative without a future public ceremony, and was not consummated, the marriage was a nullity.

²²³ *Farley v. Farley*, 94 Ala. 501, 33 Am. St. Rep. 141; *Hayes v. People*, 25 N. Y. 390, 82 Am. Dec. 364. See, also, *State v. Murphy*, 6 Ala. 765, 41 Am. Dec. 79.

²²⁴ The doctrine of the text, although unsupported by judicial authority, appears to be sound. But in *Lee v. State* (Tex. Cr. R.) 72 S. W. 1005, 61 L. R. A. 904, it was held that the man, in the circumstances stated in the text, could not set up the marriage as valid as a defense to a prosecution for rape accomplished by means

§ 36. Motives inducing matrimony immaterial.

Where the parties are married with matrimonial intent, the marriage is valid and binding, whatever may have been the motives inducing that intent. Thus, the fact that the marriage was for the purpose of escaping the payment of a debt,²²⁵ or of defrauding the creditors of the wife,²²⁶ does not affect its validity. But a mere pretended marriage, without matrimonial intent, but for some collateral object, as to enable the woman to transact certain business as the man's wife,²²⁷ or to enable the man to avoid marrying another woman,²²⁸ is, of course, a nullity.

§ 37. Curative statutes.

Since marriage requires the consent of the parties, the state could not, of course, make a man and a woman husband and wife, without their consent, by an act of the legislature declaring them to be such; but where they have given their consent, but the state has not, it is competent for the state afterwards to give its consent by an act confirming the prior marriage contracted without such consent. Thus, the legislature may confirm a marriage invalid because not celebrated by a proper person,²²⁹ or because informal,²³⁰ or because the parties

of the sham marriage. In this case, however, it would seem that the woman, by becoming prosecutrix, disaffirmed the marriage.

²²⁵ Barnett v. Kimmell, 35 Pa. 16.

²²⁶ McKinney v. Clarke, 2 Swan (Tenn.) 321, 58 Am. Dec. 59.

²²⁷ Campbell v. Sassen, 2 Wils. & S. 309.

²²⁸ Stewart v. Menzies, 2 Rob. App. 547.

²²⁹ Goshen v. Stonington, 4 Conn. 209, 10 Am. Dec. 121; Rice v. Rice, 31 Tex. 174.

²³⁰ Dickerson v. Brown, 49 Miss. 357 (provision of state constitution).

were incompetent, being within the prohibited degrees of relationship.²³¹ Such statutes, although retrospective, are not unconstitutional.²³²

§ 38. Estoppel to deny marriage.

A person may, in some circumstances, be estopped to deny the fact or validity of a marriage.²³³ This estoppel may exist either in favor of the other party to the marriage, precluding the party estopped from maintaining a suit to have the marriage annulled, or of asserting property rights inconsistent with the fact of marriage, or in favor of third persons who have dealt with either or both of the parties as husband and wife, in which case the party estopped will not be permitted to escape liability to such persons by denying the marriage.

The cases directly presenting the question of estoppel to maintain a suit to have a marriage set aside are few. It would seem, on principle, that a party to a marriage could be estopped to maintain such a suit only in the case of a marriage voidable merely, and not void. The right to have a voidable marriage set aside is a right be-

²³¹ *Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658.

²³² *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121; *Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658. But in *White v. White*, 105 Mass. 325, 7 Am. Rep. 526, it was held that a special act making valid the marriage of two persons, one of whom had been divorced and prohibited from marrying again without leave of court, which had not been obtained, was unconstitutional under the state constitution as an interference with the jurisdiction of the court.

See, generally, as to the subject-matter of this section, 1 Bishop, *Mar., Div. & Sep.* §§ 816-824; 19 Am. & Eng. Enc. Law (2d Ed.) 1216.

²³³ See note in 96 Am. Dec. 214.

longing peculiarly to the parties to the marriage, and may be exercised or not, at their option. If both parties are satisfied with such a marriage, the state has ordinarily no interest in having it annulled. It is otherwise, however, with a void marriage. Such a marriage, as we have seen, is an absolute nullity, and may be pronounced so to be in a suit brought at any time, even by strangers to the marriage. It is a matter of public concern that such a marriage should not stand. It would seem, therefore, that a party to the marriage could not become estopped to have it declared void by judicial decree.

In accordance with these principles it has been held that a person entitled to have set aside a marriage voidable for any reason, such as impotency²³⁴ or fraud,²³⁵ who voluntarily continues cohabitation after discovery of the invalidating fact, cannot thereafter maintain a suit to annul the marriage. So, also, a person who, by fraud, induces another to contract with him or her an invalid marriage, is estopped to deny its validity. In

²³⁴ Continued cohabitation or delay in instituting a suit to have a marriage annulled for impotency are matters to be considered as affecting the plaintiff's right to maintain the suit; and in some cases, though not necessarily in all cases, may constitute a bar. See *Guest v. Shipley*, 2 Hagg. Consist. 321; *T. v. D.*, L. R. 1 Prob. Div. 127; *W. v. R.*, 1 Prob. Div. 405; *Castleden v. Castleden*, 9 H. L. Cas. 186; *G. v. M.*, 10 App. Cas. 171; *Peipho v. Peipho*, 88 Ill. 438; *Shafro v. Shafro*, 28 N. J. Eq. 34. In *Norton v. Seton*, 3 Phil. 147, it was held that a man could not maintain a suit to have his marriage annulled for his own impotency, where he knew of the defect at the time of the marriage, and had cohabited with his wife for seven years.

²³⁵ See *Leavitt v. Leavitt*, 13 Mich. 452; *Scroggins v. Scroggins*, 14 N. C. (3 Dev.) 535.

such case the guilty party ought not to be permitted to take advantage of his or her wrong.²³⁶ But where a marriage is not voidable merely, but absolutely void, it has been held in several cases that a party thereto may maintain a suit to have it declared a nullity, although he was aware of its invalidity at the time of the marriage. In such case there is no estoppel.²³⁷

It has been held that an infant incapable, for want of age, to enter into a valid contract of marriage, is incapable, also, to estop himself by a fraudulent declaration of his age to assert the invalidity of the marriage in an action to have it annulled. Such declaration, therefore, works no estoppel, at least where the other party was not deceived thereby.²³⁸

²³⁶ 1 Bishop, Mar., Div. & Sep. § 546. See *State v. Murphy*, 6 Ala. 765, 41 Am. Dec. 79. But the party deceived is not so estopped, and may repudiate the marriage upon discovering the fraud. See ante, § 35.

²³⁷ It has been so held in the case of a marriage with a deceased wife's sister (*Andrews v. Ross*, 14 Prob. Div. 15), or of a bigamous marriage (*Miles v. Chilton*, 1 Rob. Ecc. 684; *Bonaparte v. Bonaparte* [1892] Prob. Div. 402; *Mounier v. Contejean*, 45 La. Ann. 419). But see, contra, as to bigamous marriages, *Tefft v. Tefft*, 35 Ind. 44; *Rooney v. Rooney*, 54 N. J. Eq. 231. In the case last cited, the suit to have the marriage declared a nullity was regarded as a suit of an equitable nature, and governed by equitable rules, rather than by the rules of the English ecclesiastical courts as established in the cases above cited. In the author's opinion, the doctrine of the English courts is the true doctrine. While in some states courts of equity have jurisdiction of suits of this nature, such suits should not be governed by the rules applying to equitable suits relating to ordinary contracts, for, as has been so often held, marriage is a very different thing from an ordinary contract.

²³⁸ *Eliot v. Eliot*, 81 Wis. 295, 51 N. W. 81, 15 L. R. A. 289. It would seem, as intimated by the court in this case, that the infant might be estopped if the other party was deceived into the marriage by the infant's false statements as to his age.

The mere fact that a person claimed to be married does not estop him or her from afterwards denying the marriage in an action brought to have it annulled.²³⁹

The question of estoppel to deny marriage has arisen in several cases involving property rights claimed under an alleged marriage. It seems that if the parties have cohabited as husband and wife, thus recognizing the marriage, neither party, nor the legal representatives of either, should be permitted, as against the other party, who believed the marriage to be valid, or his or her representatives, to deny the marriage for the purpose of defeating property rights acquired by virtue of the marriage.²⁴⁰ It has been held, however, that there can be no such estoppel in the case of a marriage absolutely void, since no civil rights can be acquired under a void marriage.²⁴¹ Clearly, such estoppel would exist only in favor of a party who had been deceived by the pretense and appearance of marriage; it could not be set up by one who knew that the marriage was invalid.²⁴² A person who, having been divorced, marries

²³⁹ *Hunter v. Hunter*, 111 Cal. 261, 43 Pac. 756, 31 L. R. A. 411. See, also, *Amory v. Amory*, 6 Rob. (N. Y.) 514.

²⁴⁰ See *Dillon v. Dillon*, 60 Ga. 204; *Donnelly v. Donnelly*, 8 B. Mon. (Ky.) 113; *Strode v. Strode*, 13 Bush (Ky.) 227, 96 Am. Dec. 211; *Young v. Foster*, 14 N. H. 114; *Johnson v. Johnson*, 1 Cold. (Tenn.) 626. Where a man and a woman married, both believing that a former husband of the woman was dead, which was not the fact, it was held that his heirs could not, after his death, recover property conveyed to her in pursuance of an ante-nuptial contract. *Ogden v. McHugh*, 167 Mass. 276, 45 N. E. 731, 57 Am. St. Rep. 456.

²⁴¹ *Gathings v. Williams*, 27 N. C. (5 Ired.) 487, 44 Am. Dec. 49; *Ponder v. Graham*, 4 Fla. 23.

²⁴² *Robins v. Potter*, 98 Mass. 532.

again in good faith, believing that the prior marriage has been dissolved, is not thereby estopped, on learning that the divorce is invalid, from denying the validity of the second marriage, and asserting his or her rights under the first.²⁴³

The parties may become estopped as to third persons. Thus, a man who holds out a woman as his wife is estopped to deny that she is such as against third persons supplying her with necessities on his credit as her husband. The question here is not so much whether the parties were in fact married, as whether they represented themselves to be married.²⁴⁴ But a party deceived into a void marriage is not estopped, even as against third persons, to repudiate the marriage upon discovering the fraud.²⁴⁵

²⁴³ *Hilton v. Roylance*, 25 Utah 129, 69 Pac. 660, 95 Am. St. Rep. 821, 58 L. R. A. 723.

²⁴⁴ 1 Bishop, Mar., Div. & Sep. § 1150; 1 Greenl. Ev. §§ 27, 207; *Johnston v. Allen*, 39 How. Pr. (N. Y.) 506. See, also, *Allen v. Wood*, 1 Bing. N. C. 8, 27 E. C. L. 521.

²⁴⁵ *Proctor v. McCall*, 2 Bailey (S. C.) 298, 23 Am. Dec. 135.

CHAPTER III.

CONFLICT OF LAWS.

- § 39. In General—Foreign Marriages.
- 40. First General Rule—Marriage Valid Where Celebrated Valid Everywhere—Exceptions.
- 41. Same—Polygamous and Incestuous Marriages.
- 42. Same—Marriages Contrary to Local Public Policy.
- 43. Same—Marriages in Evasion of Law of Domicile.
- 44. Same—Marriages after Divorce.
- 45. Same—English Doctrine.
- 46. Second General Rule—Marriage Void Where Celebrated Void Everywhere.
- 47. Legalized Polygamy.
- 48. Change of Law—Marriage Governed by Law in Force Where Celebrated.

§ 39. In general—Foreign marriages.

It is a well-recognized principle of international law that every sovereign nation has a right to regulate its own internal affairs to suit itself, without interference by any other power. It may make such laws as it may deem best for the government of its own citizens, and, with certain exceptions, of foreigners within its territorial limits; but at the same time these laws can, in general, have no extraterritorial effect. They are fully operative only within the territorial jurisdiction of the country by which they are made. It is competent, however, for a state to pass a law expressly applying to its own citizens while temporarily on foreign soil, though, of course, such a law can be enforced only upon the re-

turn of such citizens to their own country. In no case may one nation assume to regulate the conduct or affairs of citizens of another country while they are in their own or some other foreign land. These principles apply with peculiar force to laws relating to marriage.¹ Every nation and every state and territory of the Union have their own peculiar laws regulating this important institution, and the differences in these laws have given rise to many cases in conflict of laws. It should be noted in this connection that the principles of international law above stated apply not only as between sovereign nations, but also as between the several states of the Union. So far as the regulation of marriage is concerned, the states are fully sovereign. Under the constitution of the United States, the power to control and regulate marriages within a state is left entirely to

¹ "Marriage being, as already suggested, an organic institution in every civilized and well-regulated nation, no such nation can preserve its own social order, or enjoy its independent right to secure its own welfare in its own way, if any other sovereign could, without its consent, dissolve or disturb that domestic relation of its citizens which is most essential to its prosperity, moral power, and happiness. To concede such a right of foreign interference would be as suicidal in principle as to acknowledge foreign control over any other institution, or the terra firma of a state; and therefore it would seem to be sufficiently obvious, without the light of direct judicial authority, that no nation should ever arrogate any such power over the marriage contracts of foreigners not domiciled within its jurisdictional limits, and that no free state, regardless of its rights or its dignity, should ever, by acquiescence or otherwise, recognize any such assumed right of intermeddling with its domestic institutions by any foreign state." Per Robertson, C. J., in *Magnire v. Maguire*, 7 Dana (Ky.) 181. See, also, *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41.

the state, and the federal government has no jurisdiction in the matter.²

We shall now examine in detail the subject of the validity of foreign marriages. The general rule is that the question as to the validity of a marriage is to be determined by the law of the place where the marriage was celebrated. A marriage valid where celebrated is valid everywhere, and, conversely, a marriage invalid where celebrated is invalid everywhere.

§ 40. First general rule—Marriage valid where celebrated valid everywhere—Exceptions.

Since marriage is universally recognized as constituting the foundation of human society, it is rightly deemed to be an international institution, governed, in its essentials, by principles of law prevailing among all enlightened nations. The well-being of society, the legitimacy of offspring, and the disposition of property alike demand that one state or country shall recognize the validity of marriages contracted in other states or countries, according to the laws of the latter, unless some positive statute or pronounced public policy of the particular state demands otherwise.³ It is therefore a rule

² *State v. Gibson*, 36 Ind. 389, 10 Am. Rep. 42; *State v. Jackson*, 80 Mo. 175, 50 Am. Rep. 499; *Fraser v. State*, 3 Tex. App. 263, 30 Am. Rep. 131; *Green v. State*, 58 Ala. 190, 29 Am. Rep. 739. Congress has no power, under the constitution, to regulate marriage on the high seas, between citizens of the several states. *Norman v. Norman*, 121 Cal. 620, 54 Pac. 143, 66 Am. St. Rep. 74, 42 L. R. A. 343.

³ *Pennegar v. State*, 87 Tenn. 244, 10 S. W. 305, 10 Am. St. Rep. 648, 2 L. R. A. 703. The opinion in this case contains probably the best discussion of the validity of foreign marriages to be found in

of universal recognition in all civilized countries that a marriage valid where celebrated is valid everywhere.⁴ To this rule, however, there are some exceptions,⁵ namely, (1) marriages deemed contrary to the law of nature as generally recognized in Christian countries; (2) marriages positively prohibited in a state or country because contrary to local public policy. We shall consider each exception separately.

§ 41. Same—Polygamous and incestuous marriages.

The first class of exceptions comprises marriages repugnant to the moral sense of Christendom, of which the only recognized examples are polygamous and incestuous marriages. Such marriages are held void in all Christian countries, although valid where celebrated. The cases on the subject are few, but this exception is

the reports. The subject is exhaustively discussed in a note in 57 L. R. A. 155.

⁴ *Harding v. Alden*, 9 Me. 140, 23 Am. Dec. 549; *Hiram v. Pierce*, 45 Me. 367, 71 Am. Dec. 555; *Fornshill v. Murray*, 1 Bland Ch. (Md.) 479, 18 Am. Dec. 344; *Sutton v. Warren*, 10 Metc. (Mass.) 451, Woodruff, Cas. 46; *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131; *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509; *Hills v. State*, 61 Neb. 589, 85 N. W. 836, 57 L. R. A. 155; *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *State v. Ross*, 76 N. C. 242, 22 Am. Rep. 678; *Phillips v. Gregg*, 10 Watts (Pa.) 158, 36 Am. Dec. 158. It has been held that the general rule that a marriage valid where made is valid everywhere applies to Indian marriages celebrated between members of a tribe which still maintains its tribal relations and customs. *Earl v. Godley*, 42 Minn. 361, 44 N. W. 254, 18 Am. St. Rep. 517, 7 L. R. A. 125; *Johnson v. Johnson*, 30 Mo. 72, 77 Am. Dec. 598. But see, contra, *Roche v. Washington*, 19 Ind. 53, 81 Am. Dec. 376.

⁵ See *True v. Ranney*, 21 N. H. 52, 53 Am. Dec. 164, in which it was held that the law of the place of celebration would not prevail if recognizing as valid the marriage of an imbecile.

admitted by all the authorities. To bring a marriage within the exception as polygamous, one of the parties must have another consort living. To bring it within the exception as incestuous, the relation between the parties must be such as makes a marriage incestuous according to the general opinion of Christendom, which relation includes only persons in the direct line of consanguinity and brothers and sisters.⁶

In England it is held that a marriage contracted by a British subject according to laws and customs permitting polygamy is void in England, although the particular marriage was not polygamous. The ground for this decision is that such a union is not marriage as understood in Christendom, namely, the union for life of one man and one woman, to the exclusion of all others.⁷

§ 42. Same—Marriages contrary to local public policy.

A second exception to the general rule comprises marriages which have been declared by statute to be void

⁶ *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509; *Pennegar v. State*, 87 Tenn. 244, 10 Am. St. Rep. 649, 2 L. R. A. 703. In the case of incestuous marriages, the exception holds good with respect to such only as, being manifestly contrary to the law of nature, and subversive of the good order of society, are alike condemned by the common sentiment of all civilized, or at least of all Christian, nations. *Stevenson v. Gray*, 17 B. Mon. (Ky.) 193. In this case a marriage celebrated in Tennessee between a nephew and his uncle's widow, not prohibited by the laws of that state, was held valid in Kentucky, where the parties were domiciled, and where such marriages were prohibited. To the same effect see *Sutton v. Warren*, 10 Metc. (Mass.) 451, *Woodruff Cas.* 46.

⁷ *Hyde v. Hyde*, L. R. 1 Prob. Div. 130 (Mormon marriage); *In re Bethell*, 38 Ch. Div. 220 (African marriage). See, also, *Roche v. Washington*, 19 Ind. 53, 81 Am. Dec. 376.

because contrary to the public policy of the state.⁸ In a number of states such marriages, between citizens of the state, are held void, although contracted in a state in which they are not prohibited. The cases falling within this exception differ somewhat in the different states, according to differences in state policy. Thus, in the Southern states, marriages between white and colored persons are within the exception.⁹ But in Massachusetts it has been held that the marriage in Rhode Island, where such marriages were valid, of a negro and a white person, domiciled in Massachusetts, where such marriages were prohibited, was valid in Massachusetts.¹⁰ Similarly, in several states, contrary to the

⁸ A state is not bound by international comity to give effect in her courts to marriage laws of another state repugnant to her own laws and policy. *Roche v. Washington*, 19 Ind. 53, 81 Am. Dec. 376. To the same effect see *State v. Bell*, 7 Baxt. (Tenn.) 12, 32 Am. Rep. 549.

⁹ *State v. Tutty* (Ga.) 41 Fed. 753; *State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 683; *Kinney v. Com.*, 30 Grat. (Va.) 858, 32 Am. Rep. 692.

¹⁰ *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 130. This prohibition is not found in the present statutes of Massachusetts.

The cases relating to miscegenation are sometimes considered as conflicting, but they are not really so, although opposite conclusions are reached upon the same state of facts. They all agree that a foreign marriage valid where celebrated will not be sustained if contrary to local public policy. The difference consists in the view taken as to whether or not such marriages are contrary to public policy,—a question which each state must determine for itself. Plainly, the evil to be anticipated from an occasional case of miscegenation in Massachusetts, where negroes are few, is inconsiderable, and hence such marriages may not unnaturally be considered as not opposed to public policy,—itself a most indefinite thing. In the southern states, however, where negroes are numerous, the conditions are far different, and such

decided weight of authority in other states, marriages out of the state in evasion of impediments following divorce are held void as contrary to public policy.¹¹

It should be noted that state laws prohibiting certain marriages apply only to marriages celebrated within the state, or, in some cases, to marriages of persons domiciled in the state celebrated in other states. The marriage in a state of persons domiciled there, with the exception of polygamous and incestuous marriages, if valid in that state, will be upheld in another state to which such persons may afterwards remove, although prohibited in the latter state.¹²

§ 43. Same—Marriages in evasion of law of domicile.

It is held by some courts that marriages prohibited in marriages are naturally and rightly condemned. Public policy will naturally and necessarily vary with varying conditions.

¹¹ See note 18, *infra*.

¹² *State v. Ross*, 76 N. C. 242, 22 Am. Rep. 678. In this case a white woman domiciled in North Carolina, went to South Carolina for the purpose of marrying, and there married a negro domiciled in that state. Soon afterwards she returned with her husband to North Carolina to reside. Such marriages were prohibited in North Carolina, but lawful in South Carolina. It was held that the marriage was valid in North Carolina. See, also, *West Cambridge v. Lexington*, 1 Pick. (Mass.) 505, 11 Am. Dec. 231. The case of *State v. Bell*, 7 Baxt. (Tenn.) 12, 32 Am. Rep. 549, probably conflicts with the text. It does not appear from the report where the parties were domiciled, but in a later case in the same state the court said that in *State v. Bell* "this court held that a marriage between a white person and a negro, valid in Mississippi, where celebrated, was void here, in a case where the parties were domiciled in Mississippi at the time of the marriage." *Pennegar v. State*, 87 Tenn. 244, 10 S. W. 305, 10 Am. St. Rep. 648, 2 L. R. A. 703. The Tennessee court thus places such marriages on the same footing as polygamous and incestuous marriages.

a state are void there, although celebrated in another state, where there is no such prohibition, if the parties, being domiciled in the former state, went out of the state to be married, for the purpose of evading the law of their domicile. Such an evasion is considered a fraud upon the law of the domicile.¹³ Other courts hold that the marriage is not void merely because contracted in evasion of the state law, unless the statute expressly so provides.¹⁴ This appears to be the better doctrine, for if a statute does not have an extraterritorial operation of its own force, it is difficult to see how the mere intent of the parties can give it this effect. But a state may protect itself from such evasion of its law by a statute placing marriages so contracted out of the state on the same basis as those celebrated within the state, thus

¹³ Dupre v. Boulard, 10 La. Ann. 411; State v. Kennedy, 76 N. C. 251, 22 Am. Rep. 683; In re Wilbur's Estate, 8 Wash. 35, 40 Am. St. Rep. 886; Kinney v. Com., 30 Grat. (Va.) 858, 32 Am. Rep. 690; and cases cited in § 44, note 18. See, also, Newman v. Kimbrough (Tenn. Ch. App.) 59 S. W. 1061, 52 L. R. A. 668, and note in 60 Am. St. Rep. 941. It is held in Louisiana that the marriage of a minor contracted in another state in evasion of the laws of Louisiana will not effect an emancipation. Maillefer v. Saillot, 4 La. Ann. 375; Babin v. Le Blanc, 12 La. Ann. 367. In the case first cited the court said: "Through motives of public policy, the law does not pronounce the nullity of marriages thus contracted; but it is equally against public policy that they should be held to confer upon the parties all the rights which result from the marriages of minors legally authorized."

¹⁴ Medway v. Needham, 16 Mass. 157, 8 Am. Dec. 131; Com. v. Graham, 157 Mass. 73, 31 N. E. 706, 34 Am. St. Rep. 255, 16 L. R. A. 578; and cases cited in § 44, note 19. To the same effect, see Stevenson v. Gray, 17 B. Mon. (Ky.) 193, distinguished in Kinney v. Com., 30 Grat. (Va.) 858, 32 Am. Rep. 690, on the ground that the prohibited marriage upheld in that case was voidable merely, and not absolutely void.

giving to the prohibitory statute an extraterritorial effect.¹⁵

It should be noted that the decisions which declare void marriages in evasion of the law of the domicile are most if not all of them cases in which the particular marriage was repugnant to local public policy. And it has been suggested that where a statute merely prohibits certain marriages, without expressly declaring that marriages contracted in disregard of the prohibition shall be void, the question whether or not a marriage contracted out of the state in evasion of its laws shall be held void will depend largely upon the character of the prohibition sought to be evaded. If the prohibition is the result of a positive state policy that all marriages so prohibited shall be void in the state, wheresoever contracted, they will be so held; but if the prohibition relates to mere matters of form or ceremony or minor qualifications of the parties, not involving a question of public morals, the marriage, if contracted elsewhere, will be upheld, notwithstanding the evasion of local law.¹⁶

¹⁵ *State v. Tutty*, 41 Fed. 753, 7 L. R. A. 50; *Tyler v. Tyler*, 170 Mass. 150. Under the Massachusetts statute, both parties must have had the intention to evade the state laws in order to render the marriage void. *Whippen v. Whippen*, 171 Mass. 560.

¹⁶ *Pennegar v. State*, 87 Tenn. 244, 10 S. W. 305, 10 Am. St. Rep. 648. In this case the court, in discussing the second class of exceptions to the general rule that a marriage valid where celebrated is valid everywhere, said: "The second class, i. e., those prohibited in terms by the statute, presents difficulties that are not always easy of solution, and have led to conflicting decisions. This class may be subdivided into two classes: First, where the statutory prohibition relates to form, ceremony, and qualification, it is held that compliance with the law of the place

A marriage on the high seas, or in some place where there is no local law, contracted in evasion of the law

of marriage is sufficient, and its validity will be recognized, not only in other states generally, but in the state of the domicile of the parties, even where they have left their own state to marry elsewhere, for the purpose of avoiding the laws of their domicile. Instead of being a subdivision of the second class of exceptions, it would be more accurate to say that it is an exception to the exception, and falls within the operation of the general rule, first announced, of 'valid where performed, valid everywhere.' To the second subdivision of the second class of exceptions belong cases which, prohibited by statute, may or may not embody distinctive state policy, as affecting the morals or good order of society.

"It is not always easy to determine what is a positive state policy. It will not do to say that every provision of a statute prohibiting marriage, under certain circumstances, is indicative of a state policy in the sense in which it is used in this connection. To so hold would be to overturn this most solemn relation, involving legitimacy of offspring, homestead, dower, and the rights of property, in the face of the conclusions of approved text writers, and the concurrence of the adjudications in numerous cases, relating not only to forms or ceremonies and qualifications of the parties, but also to prohibited degrees of relationship, not incestuous in the common opinion of Christian countries, and relating to marriages between persons of different race and color. Each state or nation has ultimately to determine for itself what statutory inhibitions are by it intended to be imperative, as indicative of the decided policy of the state concerning the morals and good order of society, to that degree which will render it proper to disregard the *jus gentium* of 'valid where solemnized, valid everywhere.' The legislature has, beyond all possible question, the power to enact what marriages shall be void in its own state, notwithstanding their validity in the state where celebrated, whether contracted between parties who were in good faith domiciled in the state where the ceremony was performed, or between parties who left the state of domicile for the purpose of avoiding its statutes, when they come to return to the state; and some of the states have in terms legislated on the subject. Where, however, the legislature, as in our own state, has not deemed it proper or necessary to provide in terms what shall be the fate

of the domicile of the parties, is void, since, in such case, the parties will be subject to the law of their domicile.¹⁷

§ 44. Same—Marriages after divorce.

The question as to the validity of foreign marriages has arisen in numerous cases in which a divorced person prohibited by statute or the decree of divorce from marrying again leaves the state for the purpose of evading such prohibition, marries in another state, and then

of a marriage valid where performed, but has in the particular case contented itself with merely prohibiting such marriage, the duty is devolved upon the courts of determining, from such legislation as is before it, whether the marriage in the other state is valid or void when the parties come into this state.

"If, as we have seen, the statutory inhibition relates to matters of form or ceremony, and in some respects to qualification of the parties, the courts would hold such marriage valid here; but if the statutory prohibition is expressive of a decided state policy as a matter of morals, the courts must adjudge the marriage void here, as *contra bonos mores*."

This distinction has been approved in *State v. Tutty*, 41 Fed. 753, 7 L. R. A. 50; *Jackson v. Jackson*, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773; and *Estate of Stull*, 183 Pa. 625, 39 Atl. 16, 63 Am. St. Rep. 776. In the latter case the court said: "The foregoing reasoning is satisfactory to us. It involves practically three distinct ideas, to-wit: (1) That the foreign marriage is contrary to the positive statute of the domicile; (2) that it is contrary to the public policy of the government of the domicile, in that it offends against the prevailing sense of good morals among the people there dwelling; and (3) it was contracted for the express purpose of evading the positive law of the domicile, and is therefore to be regarded as a fraud upon the government and people of the domiciliary residence. The combination of these three objections seems to be most fatal to the validity of the marriage thus contracted. The writer is disposed to regard each one of them as fatal."

¹⁷ *Norman v. Norman*, 121 Cal. 620, 54 Pac. 143, 66 Am. St. Rep. 74, 43 L. R. A. 343. See note in 60 Am. St. Rep. 947.

returns to the state of his domicile. It is held by some courts that such marriages are void in the domicile state, although valid in the state where celebrated.¹⁸ But by the weight of authority it is held that these prohibitions have no extraterritorial effect unless the statutes expressly so provide, and such marriages are valid in the domicile state, although contracted elsewhere with intent to evade its laws.¹⁹ Statutes imposing such prohibitions are of a penal nature, and every presumption is against an intent of the legislature to make them operative beyond the limits of the state, and they will not be given this effect unless such an intent is clearly expressed in the statute.²⁰ Of course, if the statute expressly so provides, a marriage in evasion of the prohibition is void.²¹

But if the prohibition operates upon both parties, and is imposed temporarily, not as a punishment, but merely for the purpose of affording an opportunity to take an appeal from the decree of divorce, the better view is that a marriage contracted in another state in violation of the prohibition is void. This is upon the prin-

¹⁸ Estate of Stull, 183 Pa. 625, 39 Atl. 16, 63 Am. St. Rep. 776, 39 L. R. A. 539; Williams v. Oates, 27 N. C. (5 Ired.) 535; Penegar v. State, 87 Tenn. 244, 10 S. W. 305, 10 Am. St. Rep. 648, 2 L. R. A. 703. See, also, Newman v. Kimbrough (Tenn. Ch. App.) 59 S. W. 1061, 52 L. R. A. 668.

¹⁹ Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505; Thorp v. Thorp, 90 N. Y. 602, 43 Am. Rep. 189; Moore v. Hegeman, 92 N. Y. 521, 44 Am. Rep. 408; State v. Shattuck, 69 Vt. 403, 60 Am. St. Rep. 936, 40 L. R. A. 428; note in 60 Am. St. Rep. 941. See, also, Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509.

²⁰ Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505.

²¹ Tyler v. Tyler, 170 Mass. 150.

ciple, not that the prohibition has extraterritorial force, but that the parties have not been finally divorced. And since no final divorce has been granted, the second marriage would be void, even in the state where celebrated.²²

§ 45. Same—English doctrine.

The general rule that a marriage valid where celebrated is valid everywhere has received in England an interpretation which renders it, in most cases, a nullity. It is there held that while the forms and ceremonies of marriage are governed by the law of the place where the marriage is celebrated, the essentials of the marriage, including the capacity of the parties, are to be determined by the law of the country in which the parties are domiciled at the time of the marriage. The leading case in which this doctrine is announced is *Brook v. Brook*,²³ in which it was held that a marriage in Denmark of a man with his deceased wife's sister, both parties being British subjects, was void in England, though valid in Denmark. This case has been severely criticised,²⁴ but it has received judicial approval in several American cases.²⁵

²² *McLennan v. McLennan*, 31 Or. 480, 50 Pac. 802, 65 Am. St. Rep. 835, 38 L. R. A. 863. Contra, *Willey v. Willey*, 22 Wash. 115, 60 Pac. 145, 79 Am. St. Rep. 923. It should be noted that the validity and force of a decree of divorce is to be determined by the law of the state in which the divorce is granted. If not a valid or effective divorce in that state, it is not effective in any other state. See post, § 142.

²³ *Brook v. Brook*, 9 H. L. Cas. 193. For a discussion of the English doctrine, see 5 Enc. Laws Eng. 434.

²⁴ See 1 Bishop, Mar., Div. & Sep. §§ 876-879; *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509.

²⁵ *State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 683; *Kinney v.*

§ 46. Second general rule—Marriage void where celebrated void everywhere.

Conversely to the rule just discussed, a marriage void where celebrated is void everywhere.²⁶ To this rule there are some exceptions in the case of persons temporarily in a foreign country, who may, in some cases, contract a valid marriage without celebrating it according to the local requirements. Examples are, marriages within the lines of an army of invasion of subjects of the invading power,²⁷ and marriages according to the law of their domicile of persons in a foreign country who could not marry according to the local law.²⁸

§ 47. Legalized polygamy.

The differences in the marriage laws of the several states may lead to an interesting result. Under the decision of the Virginia court, the marriage in Washington, D. C., of a negro man and a white woman, both residents of Virginia, who go to Washington for the purpose of being married in evasion of the Virginia statutes, is void in Virginia, though valid in Washington.²⁹

Com., 30 Grat. (Va.) 858, 32 Am. Rep. 690. In these cases the approval is by way of dictum merely, for the particular marriages considered were held void because repugnant to local public policy. The English doctrine seems to receive direct support, however, in *Succession of Hernandez*, 46 La. Ann. 962, 15 So. 461, 24 L. R. A. 831.

²⁶ *Scrimshire v. Scrimshire*, 2 Hagg. Consist. 395; *Middleton v. Janverin*, 2 Hagg. Consist. 437; *Canale v. People*, 177 Ill. 219, 52 N. E. 310; *Norcross v. Norcross*, 155 Mass. 425, 29 N. E. 506.

²⁷ *Ruding v. Smith*, 2 Hagg. Consist. 371.

²⁸ See 1 *Bishop, Mar., Div. & Sep.* §§ 886-906; *Phillips v. Gregg*, 10 Watts (Pa.) 158, 36 Am. Dec. 158.

²⁹ *Kinney v. Com.*, 30 Grat. (Va.) 858, 32 Am. Rep. 690.

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It follows that if, after returning to Virginia, the parties separate, the man remaining in Virginia and the woman going back to Washington, the man may marry a negro woman in Virginia (his prior marriage being void), and thereafter may divide his time between the two women, living in Virginia with the negress, his lawful Virginia wife, and in Washington with the white woman, his no less lawful Washington wife. Thus we may have legalized polygamy.^{29a} Possibly a further study of the laws of the different states might enable him to secure a third lawful wife in some other state.

§ 48. Change of law—Marriage governed by law in force when celebrated.

As a general rule, the validity and effect of a marriage are to be determined by the law in force when the marriage was celebrated. Statutes changing the law will not be construed so as to operate retrospectively unless the intent that they shall so operate be clearly expressed or necessarily implied. Every reasonable doubt is resolved against a retrospective operation of the statute.³⁰

^{29a} In this case, neither in Virginia nor in Washington could the man be prosecuted for bigamy or illicit cohabitation, for no state will enforce the criminal laws of another state, nor punish its own citizens for acts done outside of the state, in the absence of a statute so providing. Of course, if either wife objected to the arrangement, she could get a divorce on the ground of adultery.

³⁰ *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50.

CHAPTER IV.

PROOF OF MARRIAGE.

- § 49. In General.
- 50. Presumptions in Favor of Marriage—In General.
- 51. Same—Presumption from Cohabitation and Repute.
- 52. Same—Cohabitation Originally Illicit.
- 53. Same—Presumption of Dissolution of Prior Marriage.
- 54. Same—Strength of Presumptions.
- 55. Proof of Foreign Marriages.
- 56. Proof in Criminal Cases.
- 57. Burden of Proof. .

§ 49. In general.

Marriage is a fact, and may be proved, like any other fact, by any evidence competent under the general rules of evidence.¹ Where the marriage has been formally celebrated, it may be proved by the marriage license and the return thereon,² the certificate of the celebrant,³

¹ Marriage may be proved by any species of evidence not prohibited by law which does not presuppose a higher species within the power of the party. *Holmes v. Holmes*, 6 La. 463, 26 Am. Dec. 482. The record of a decree of divorce in a suit of which the defendant had legal notice is evidence of the marriage. *Halbrook v. State*, 34 Ark. 511, 36 Am. Rep. 17; *Williams v. Williams*, 63 Wis. 58, 23 N. W. 110, 53 Am. Rep. 253. But it is not necessarily conclusive. *Williams v. Williams*, 63 Wis. 58, 23 N. W. 110, 53 Am. Rep. 253. See, generally, as to the presumption and proof of marriage, 19 Am. & Eng. Enc. Law (2d Ed.) 1197-1209; notes in 22 Am. Dec. 157; 57 Am. Rep. 451; 47 Am. St. Rep. 228; 89 Am. St. Rep. 198; 7 L. R. A. 799.

² *Tucker v. People*, 122 Ill. 583, 13 N. E. 809.

³ *Northrop v. Knowles*, 52 Conn. 522, 52 Am. Rep. 613; *State v. Schweitzer*, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125; *Moore v.*

or the marriage record, or a certified copy thereof.⁴ Such documentary evidence, when readily obtainable, is the obvious and most convenient means of proving the marriage; but it is not the only means of proof. Thus, the marriage may be proved by the witnesses to the ceremony,⁵ and for this purpose the clergyman or officer who performed the ceremony is a competent witness, both of the fact that the ceremony was performed,⁶ and of his authority to perform it.⁷ So, also, the parties to the marriage are competent witnesses to prove it,⁸ or it may be proved by their admissions, declarations, or confessions.⁹

Com., 19 Leigh (Va.) 639. See, also, *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754.

⁴ *Halbrook v. State*, 34 Ark. 511, 36 Am. Rep. 17; *State v. White*, 19 Kan. 445, 27 Am. Rep. 137; *Com. v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468. See, also, *Smith v. Smith*, 1 Tex. 621, 46 Am. Dec. 121.

⁵ *State v. Kean*, 10 N. H. 347, 34 Am. Dec. 162; *Warner v. Com.*, 2 Va. Cas. 95.

⁶ *People v. Imes*, 110 Mich. 250; *Taylor v. State*, 52 Miss. 84; *Bird v. Com.*, 21 Grat. (Va.) 800; *State v. Goodrich*, 14 W. Va. 834.

⁷ *Com. v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468, 28 L. R. A. 318; *Bird v. Com.*, 21 Grat. (Va.) 800. The testimony of witnesses that the celebrant was authorized and performed the ceremony in his official capacity is sufficient proof of his authority. *State v. Robbins*, 28 N. C. (6 Ired.) 23, 44 Am. Dec. 64; *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754; *Warner v. Com.*, 2 Va. Cas. 95.

⁸ *State v. Schweitzer*, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125; *Com. v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468, 28 L. R. A. 318; *Richard v. Brehm*, 73 Pa. 140, 13 Am. Rep. 733.

⁹ *Cameron v. State*, 14 Ala. 546, 48 Am. Dec. 111; *Williams v. State*, 54 Ala. 131, 25 Am. Rep. 665; *Halbrook v. State*, 34 Ark. 511, 36 Am. Rep. 17; *State v. Schweitzer*, 57 Conn. 532, 6 L. R. A. 125; *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410; *Com. v. Jackson*, 11

§ 50. Presumptions in favor of marriage—In general.

In general, where a man and a woman have cohabited as man and wife, it will be presumed that they are married. Every presumption is in favor of the innocence of the parties and the legitimacy of their children. The law presumes morality and not immorality, marriage and not concubinage, legitimacy and not bastardy.¹⁰ Thus, where a formal marriage is proved, it will be presumed that the parties were competent,¹¹ and consented,¹² that the celebrant was duly authorized,¹³ and that the ceremony was in all respects regular.¹⁴ But the pre-

Bush (Ky.) 679, 21 Am. Rep. 225; *State v. Libby*, 44 Me. 469, 69 Am. Dec. 115; *Wolverton v. State*, 16 Ohio, 173, 47 Am. Dec. 373; *Forney v. Hallacher*, 8 Serg. & R. (Pa.) 159, 11 Am. Dec. 590; *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754; *Womack v. Tankersley*, 78 Va. 242; *Warner v. Com.*, 2 Va. Cas. 95; *Eldred v. Eldred*, 97 Va. 606. An admission of marriage, contained in a letter, is competent evidence against a party. *Com. v. Hayden*, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318. See, also, *Badger v. Badger*, 88 N. Y. 546, 42 Am. Rep. 263. In an action for criminal conversation with the plaintiff's wife, the defendant's declarations that he knew the woman was married to the plaintiff are competent evidence of the marriage. *Forney v. Hallacher*, 8 Serg. & R. (Pa.) 159, 11 Am. Dec. 590.

¹⁰ See, generally, cases cited in this section and sections immediately following.

¹¹ *Harrod v. Harrod*, 1 Kay & G. 4. See post, § 53.

¹² *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Fleming v. People*, 27 N. Y. 329.

¹³ *Jones v. Jones*, 18 Me. 308, 36 Am. Dec. 723; *State v. Robbins*, 28 N. C. (6 Ired.) 23, 44 Am. Dec. 64; *Estate of Megginson*, 21 Or. 387, 28 Pac. 388, 14 L. R. A. 540; *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754.

¹⁴ *Pratt v. Pierce*, 36 Me. 448, 58 Am. Dec. 758; *People v. Calder*, 30 Mich. 85; *People v. Schoonmaker*, 117 Mich. 190, 72 Am. St. Rep. 560; 1 Bishop, Mar., Div. & Sep. §§ 944-948. See note in 14 L. R. A. 540. The fact that an official marriage license was issued

sumption in favor of the validity of a marriage cannot, of course, prevail where the marriage is clearly shown to be invalid.¹⁵

§ 51. Same—Presumption from cohabitation and repute.

The rule that every presumption is in favor of marriage is most frequently applied to cases in which there is no proof of a formal marriage, but the parties alleged to be married have cohabited as husband and wife, and are generally reputed to be such. In such a case it will be presumed that they are married. The marriage may thus be established by circumstantial evidence, direct proof being unnecessary,¹⁶ and a marriage so established will prevail over a subsequent ceremonial marriage.¹⁷

In order to raise a presumption of marriage, the cohabitation relied on must, of course, have been a matri-

carries with it a presumption that all statutory prerequisites thereto had been complied with. *Nofire v. U. S.*, 164 U. S. 657.

¹⁵ *Morrill v. Palmer*, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

¹⁶ *Arthur v. Broadnax*, 3 Ala. 557, 37 Am. Dec. 707; *White v. White*, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; *Hiler v. People*, 156 Ill. 511, 41 N. E. 181, 47 Am. St. Rep. 221; *Chiles v. Drake*, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41; *Holmes v. Holmes*, 6 La. 463, 26 Am. Dec. 482.

¹⁷ *Sellman v. Bowen*, 8 Gill & J. (Md.) 50, 29 Am. Dec. 524; *Boone v. Purnell*, 28 Md. 607, 92 Am. Dec. 713; *Jones v. Jones*, 48 Md. 391, 30 Am. Rep. 466; *Jackson v. Jackson*, 80 Md. 176; *Badger v. Badger*, 88 N. Y. 547, 42 Am. Rep. 263; *Hynes v. McDermott*, 91 N. Y. 451; *Richard v. Brehm*, 73 Pa. 140, 13 Am. Rep. 733; *Estate of Pickens*, 163 Pa. 14, 29 Atl. 875, 25 L. R. A. 477; *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477; *Thompson v. Nims*, 83 Wis. 261, 53 N. W. 502, 17 L. R. A. 847; *Camden v. Belgrade*, 75 Me. 126, 46 Am. Rep. 364. But see *Smith v. Smith*, 1 Tex. 621, 46 Am. Dec. 121.

monial cohabitation of such a character as to create a reputation of marriage; an occasional and irregular association is not sufficient. A marriage cannot be presumed from the mere fact of cohabitation.¹⁸ So, also, the reputation of marriage must be general, consistent, and uniform.¹⁹ Where the only evidence adduced to prove a marriage is that of cohabitation and reputation, it is perhaps competent to weaken or overthrow such evidence by showing that the reputation of marriage was not general, but divided;²⁰ but where an actual ceremonial marriage is proved, evidence that the cohabitation of the parties was reputed to be illicit is inadmissible.²¹

§ 52. Same—Cohabitation originally illicit.

~~A marriage will not be presumed from a cohabitation shown to be illicit in its origin.~~ In such case the illicit relation is presumed to continue, and a marriage subsequent to its commencement must be proved.²² But the

¹⁸ McKenna v. McKenna, 180 Ill. 577; Jackson v. Jackson, 80 Md. 176; Com. v. Stump, 53 Pa. 132, 91 Am. Dec. 198; Appeal of Reading Fire Ins., etc., Co., 113 Pa. 204, 57 Am. Rep. 448; Williams v. Herrick, 21 R. I. 401, 43 Atl. 1036, 79 Am. St. Rep. 809; Eldred v. Eldred, 97 Va. 606, 34 S. E. 477.

¹⁹ McKenna v. McKenna, 180 Ill. 577; Powers v. Charmbury's Ex'rs, 35 La. Ann. 630; Jackson v. Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773; Williams v. Herrick, 21 R. I. 401, 43 Atl. 1036, 79 Am. St. Rep. 809. See, also, Boone v. Purnell, 28 Md. 607, 92 Am. Dec. 713; Badger v. Badger, 88 N. Y. 547, 42 Am. Rep. 263; Gall v. Gall, 114 N. Y. 109.

²⁰ See Northrop v. Knowles, 52 Conn. 522, 52 Am. Rep. 613; Badger v. Badger, 88 N. Y. 547, 42 Am. Rep. 263. Evidence of general reputation is admissible in disproof of marriage. Boone v. Purnell, 28 Md. 607, 92 Am. Dec. 713.

²¹ Northrop v. Knowles, 52 Conn. 522, 52 Am. Rep. 613.

²² White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; Cart-

presumption that the relation continued to be illicit, like other presumptions respecting marriage, is rebuttable, and it may be proved that the parties, after so cohabiting, became husband and wife.²³

The rule just stated does not apply where the cohabitation, although in fact unlawful, was innocent. Thus, where parties are married in the honest and reasonable but mistaken belief that a prior marriage of one of them has been dissolved, they are, of course, not lawfully married, and their cohabitation is illicit;²⁴ but if, in such case, they continue to cohabit after learning that such prior marriage has been dissolved by death or divorce, it will be presumed that they agreed to become husband and wife after learning that the disability had been removed. And in states in which common-law marriages are valid, their subsequent cohabitation is lawful, and no formal re-marriage is necessary.²⁵ But

wright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105; Potter v. Clapp, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322; Cram v. Burnham, 5 Me. 213, 17 Am. Dec. 218; Badger v. Badger, 88 N. Y. 547, 42 Am. Rep. 263; Hunt's Appeal, 86 Pa. 294; Appeal of Reading Fire Ins., etc., Co., 113 Pa. 204, 57 Am. Rep. 448; Estate of Grimm, 131 Pa. 199, 18 Atl. 1061, 17 Am. St. Rep. 796, 6 L. R. A. 717; Williams v. Williams, 46 Wis. 464, 32 Am. Rep. 722; Spencer v. Pollock, 83 Wis. 215, 53 N. W. 490, 17 L. R. A. 848. See note in 14 L. R. A. 364.

²³ White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

²⁴ See ante, § 15.

²⁵ Poole v. People, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 245; Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105; Teter v. Teter, 101 Ind. 129, 51 Am. Rep. 742; Blanchard v. Lambert, 43 Iowa, 228, 22 Am. Rep. 245; Renfrow v. Renfrow, 60 Kan. 277, 56 Pac. 534, 72 Am. St. Rep. 350; Taylor v. Swett, 3 La. 33, 22 Am. Dec. 156; Barker v. Valentine, 125 Mich. 336, 84 N. W. 297, 84 Am. St. Rep. 578, 51 L. R. A. 787; University of Michigan v. Mc-

it is plain that neither the mere removal of the disability alone, nor the removal of the disability and the continued cohabitation combined, can render the parties husband and wife without a consent to marriage after the removal of the disability. The only effect of the continued cohabitation is that it raises the presumption, in favor of innocence, that there was such a consent. But this is a presumption merely, and cannot prevail

Guckin, 62 Neb. 489, 87 N. W. 180, 57 L. R. A. 917; *Eaton v. Eaton* (Neb.) 92 N. W. 995, 60 L. R. A. 605; *Fenton v. Reed*, 4 Johns. (N. Y.) 52, 4 Am. Dec. 244; *North v. North*, 1 Barb. Ch. (N. Y.) 241, 43 Am. Dec. 778. See, also, *Schuchart v. Schuchart*, 61 Kan. 597, 60 Pac. 311, 78 Am. St. Rep. 342/ 50 L. R. A. 180; *Smith v. Smith*, 1 Tex. 621, 46 Am. Dec. 121. In *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106, the court said: "The cohabitation, apparently decent and orderly, of two persons opposite in sex, raises a presumption of more or less strength that they have been duly married. While such cohabitation does not constitute marriage, it tends to prove that a marriage contract has been entered into by the parties. Where, however, the cohabitation is illicit in its origin, the presumption is that it so continues until a change in its character is shown by acts and circumstances strongly indicating that the connection has become matrimonial. It is sufficient if the acts and declarations of the parties, their reputation as married people, and the circumstances surrounding them in their daily lives, naturally lead to the conclusion that, although they began to live together as man and mistress, they finally agreed to live together as husband and wife. A present agreement between competent parties to take each other for husband and wife constitutes a valid marriage, even if not in the presence of witnesses. Such a marriage may be proved by showing actual cohabitation as husband and wife, acknowledgment, declarations, conduct, repute, reception among neighbors and relations, and the like. And where the intercourse was illicit at first, but was not then accompanied by any of the evidences of marriage, and subsequently it assumes a matrimonial character, and is surrounded by the evidences of a valid marriage above named, a question of fact arises for the determination of the jury * * * whether all of the circumstances, taken together, are sufficient evidence of marriage."

against proof that there was no such consent. The law never indulges in presumptions contrary to what the fact is shown to be. If, therefore, it appears that there was no matrimonial consent after the removal of the disability, there is no valid marriage, notwithstanding continued cohabitation.²⁶ It follows that if the parties, after their marriage, learn of the existence of the disability and the consequent illegality of their relation, but nevertheless continue to live together, their continued cohabitation, even after they learn that the disability has been removed, raises no presumption of marriage. In such case the cohabitation, having become clearly meretricious, is presumed to continue so.²⁷ And for a stronger reason would this be true where they have no knowledge of the removal of the disability. But such knowledge would seem to be unnecessary where neither party was aware of the existence of the disability. In such case the continuing matrimonial intent with which they cohabit, although ineffective so long as either party is under disability, becomes operative as soon as the disability ceases to exist, and this, it would seem, although the parties, being unaware of the existence of the disability, knew nothing of its removal. It has been held, however, that where one of the parties knew of the existence of the disability, but the other did not, there is no valid marriage, notwithstanding con-

²⁶ *Voorhees v. Voorhees*, 46 N. J. Eq. 411, 19 Am. St. Rep. 404; *Collins v. Voorhees*, 47 N. J. Eq. 555, 24 Am. St. Rep. 412, 14 L. R. A. 364.

²⁷ See *Cram v. Burnham*, 5 Me. 213, 17 Am. Dec. 218; *Eaton v. Eaton* (Neb.) 92 N. W. 995, 60 L. R. A. 605.

tinued cohabitation after the prior marriage was dissolved.²⁸

Of course, continued cohabitation after the dissolution of the prior marriage, even with matrimonial intent, will not constitute a valid marriage in states in which common-law marriages are not valid.²⁹

§ 53. Same—Presumption of dissolution of prior marriage.

The law will presume against bigamy, and hence, in favor of the validity of a second marriage, it will ordinarily be presumed, after a reasonable time, that the prior marriage was dissolved by death³⁰ or divorce.³¹

²⁸ *Collins v. Voorhees*, 47 N. J. Eq. 555, 24 Am. St. Rep. 412, 14 L. R. A. 364. In this case, a man who had obtained a divorce from his wife, which he knew to be void, married another woman, who knew nothing of the impediment to the second marriage. The parties lived together as husband and wife until the man's death, the woman never suspecting that the marriage was invalid. After the second marriage, the first wife obtained a divorce, but it was held that the continued cohabitation of the parties to the second marriage thereafter did not render their marriage valid. See, also, *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Hunt's Appeal*, 86 Pa. 294. It is submitted that this decision is not sound. Much stress was laid in the opinion upon the fact that the man, in contracting a marriage which he knew was unlawful, had no matrimonial intent, and therefore no such intent could be presumed from his continuance of the cohabitation after the divorce. So far the argument is sound; but it has already been established that if either party believes the marriage to be valid, the parties being competent, it is valid, notwithstanding the other party did not intend marriage. This doctrine would seem to apply here. See ante, § 35. And see *Barker v. Valentine*, 125 Mich. 336, 84 N. W. 297, 51 L. R. A. 787.

²⁹ *Morrill v. Palmer*, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

³⁰ *Halbrook v. State*, 34 Ark. 511, 36 Am. Rep. 17; *People v. Feilen*, 58 Cal. 218, 41 Am. Rep. 258; *Hunter v. Hunter*, 111 Cal. 261, 43 Pac. 756, 52 Am. St. Rep. 180, 31 L. R. A. 411; *Johnson v.*

In this case there is a conflict of presumptions. The presumption of life, or of the continuance of a marriage shown once to exist, is overcome by the weightier presumption, in favor of innocence and legitimacy, that the second marriage is valid. This presumption, however, is not conclusive, and will not prevail where there is no room for it, or where it is overcome by evidence

Johnson, 114 Ill. 611, 3 N. E. 232, 55 Am. Rep. 883; *Kelly v. Drew*, 12 Allen (Mass.) 107, 90 Am. Dec. 138. See, also, *Sneathen v. Sneathen*, 104 Mo. 20, 24 Am. St. Rep. 326. Where, after having been abandoned by her husband for four and one-half years, during which time he had not been heard from, a woman married again, it was held that it would be presumed, in favor of the validity of the second marriage, that the first husband was dead. *Hunter v. Hunter*, 111 Cal. 261, 43 Pac. 756, 52 Am. St. Rep. 180, 31 L. R. A. 411. In this case the court said: "There was no proof tending to show that Milam [the first husband] was dead or that his chance of life was below the average; therefore it is contended the court should have found that he was alive. This presumption of the continuance of life is, however, overcome by another. It is presumed that a person is innocent of crime or wrong. There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid, and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years, or, when the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement, perhaps, would be that the burden is cast upon the party asserting guilt or immorality to prove the negative,—that the first marriage had not ended before the second marriage."

³¹ *Pittinger v. Pittinger*, 28 Colo. 308, 64 Pac. 195, 89 Am. St. Rep. 193; *Boulden v. McIntire*, 119 Ind. 574, 21 N. E. 445, 12 Am. St. Rep. 453; *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245; *Alabama, etc., R. Co. v. Beardsley*, 79 Miss. 417, 30 So. 660, 89 Am. St. Rep. 660; *Hadley v. Rash*, 21 Mont. 170, 53 Pac. 312, 69 Am. St. Rep. 649.

to the contrary.³² It seems that the presumption should be indulged with caution, each case being determined upon its own facts and circumstances.³³

§ 54. Same—Strength of presumptions.

The presumption of marriage arising from cohabitation apparently matrimonial, or of the legality of a marriage when shown, is one of the strongest presumptions known to the law, and its strength increases with the lapse of time. When once raised, this presumption can be overcome only by evidence of the most clear and satisfactory character.³⁴ But cohabitation and reputation do not constitute marriage. They are only evidence tending to raise a presumption of marriage,³⁵ and this

³² *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105; *McCarty v. McCarty*, 2 Strob. (S. C.) 6, 47 Am. Dec. 585; *Williams v. Williams*, 63 Wis. 58, 23 N. W. 110, 53 Am. Rep. 253. See, also, *Parker v. State*, 77 Ala. 47, 54 Am. Rep. 43; *Com. v. Thompson*, 6 Allen (Mass.) 591, 83 Am. Dec. 653; *Id.*, 11 Allen (Mass.) 23, 87 Am. Dec. 685.

³³ See monographic note in 89 Am. St. Rep. pp. 198-206, in which the subject is fully discussed. Also note in 14 L. R. A. 542, 543.

³⁴ *Pittinger v. Pittinger*, 28 Colo. 308, 64 Pac. 195, 89 Am. St. Rep. 193; *Teter v. Teter*, 101 Ind. 129, 51 Am. Rep. 742; *Hadley v. Rash*, 21 Mont. 170, 53 Pac. 312, 69 Am. St. Rep. 649; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *Estate of Pickens*, 163 Pa. 14, 29 Atl. 875, 25 L. R. A. 477; *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477. The presumption of marriage is especially strong in cases involving the legitimacy of children. *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *Johnson v. Johnson's Adm'rs*, 30 Mo. 72, 77 Am. Dec. 598.

³⁵ *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477. "Courts cannot marry parties by mere presumption. In the absence of consent, the status of marriage is never created by any government. The law compels no one to assume the matrimonial status. Without assent, no statute or constitution can create this relation." Per *Shope, J.*, in *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105.

presumption, while ordinarily sufficient to establish a marriage, in the absence of countervailing evidence, may, of course, be overcome by counter evidence or counter presumptions, and, when the presumption is so overcome, the marriage must be established by more direct proof, or it will fail.³⁶

§ 55. Proof of foreign marriages.

The general rules above stated as to the proof or presumption of marriage apply to marriages celebrated in other states or foreign countries, as well as to those celebrated within the state.³⁷ Thus, where a formal

³⁶ *Jenkins v. Jenkins*, 83 Ga. 283, 20 Am. St. Rep. 316; *Hiler v. People*, 156 Ill. 511, 41 N. E. 181, 47 Am. St. Rep. 221; *Boone v. Purnell*, 28 Md. 607, 92 Am. Dec. 713; *Jones v. Jones*, 48 Md. 391, 30 Am. Rep. 466; *Stevenson's Heirs v. McReary*, 12 Smedes & M. (Miss.) 9, 51 Am. Dec. 102; *Appeal of Reading Fire Ins., etc., Co.*, 113 Pa. 204, 57 Am. Rep. 448; *Allen v. Hall*, 2 Nott & McC. (S. C.) 114, 10 Am. Dec. 578; *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477. The declarations of either of the parties are admissible to disprove the marriage. *Allen v. Hall*, 2 Nott & McC. (S. C.) 114, 10 Am. Dec. 578. But see *Thompson v. Nims*, 83 Wis. 261, 53 N. W. 502, 17 L. R. A. 847. The presumption of an actual marriage from the fact of cohabitation is rebutted by proof of a subsequent permanent separation without apparent cause, and the marriage in solemn form of one of the parties shortly after the separation. *Weatherford v. Weatherford*, 20 Ala. 548, 56 Am. Dec. 206. But proof of a subsequent ceremonial marriage will not alone be sufficient to overcome the presumption of marriage arising from cohabitation and reputation, nor justify the exclusion of circumstantial evidence of the prior marriage. *Camden v. Belgrade*, 75 Me. 126, 46 Am. Rep. 364. The fact that parties cohabiting as husband and wife procure the performance of a marriage ceremony between them is some evidence that they had not been previously married, but is not conclusive. *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671.

³⁷ See *Williams v. State*, 54 Ala. 131, 25 Am. Rep. 665; *Jackson v. Jackson*, 80 Md. 176, 82 Md. 17, 34 L. R. A. 773; *Smith v. Smith*,

marriage abroad or in another state is proved, it will be presumed to be valid according to the law of the place where celebrated, and it is not necessary to prove the foreign law of marriage.³³ So, also, where no formal marriage is shown, marriage abroad may be presumed from cohabitation and repute.³⁹

§ 56. Proof in criminal cases.

In criminal cases,—that is to say, where the result of proving the marriage would be to prove the defendant guilty of a criminal offense, as adultery, bigamy, and the like,—a stricter rule of proof is adopted than in civil cases. In a criminal case there must be direct proof of an actual marriage in fact; the presumption of marriage arising from matrimonial cohabitation is not sufficient. No particular mode of proof, however, is required. The marriage may be proved by documentary evidence, the testimony of witnesses, the confessions or admissions of the defendant, etc., as in other cases.⁴⁰

1 Tex. 621, 46 Am. Dec. 121. The foreign law of marriage, like any other foreign law, will not be judicially taken notice of, but must be proved as a fact. It may generally be proved by the testimony of persons familiar with it. *Taylor v Swett*, 3 La. 33, 22 Am. Dec. 156; *Phillips v. Gregg*, 10 Watts (Pa.) 158, 36 Am. Dec. 158. In the absence of evidence of the statutory law of another state relating to marriage, the courts of one state will presume that the common law of another state is the same as that of their own state. *Com. v. Graham*, 157 Mass. 73, 31 N. E. 706, 34 Am. St. Rep. 255, 16 L. R. A. 578.

³³ *Com. v. Kenney*, 120 Mass. 387; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *State v. Kean*, 10 N. H. 347, 34 Am. Dec. 162; *Bird v. Com.*, 21 Grat. (Va.) 800; *Lancot v. State*, 98 Wis. 136, 73 N. W. 575, 67 Am. St. Rep. 800.

³⁹ *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538; *Id.*, 91 N. Y. 451, 43 Am. Rep. 677.

⁴⁰ *Williams v. State*, 54 Ala. 131, 25 Am. Rep. 665; *Parker v.*

§ 57. Burden of proof.

The burden of proving a marriage rests, of course, in the first instance, upon the party alleging it, as in the case of proof of any other fact.⁴¹ But where a *prima facie* case of marriage is made out, since the presumption is in favor of marriage, a person asserting the invalidity of the marriage has the burden of proving its invalidity, even though this may require proof of a negative.⁴² Thus, restrictions and conditions imposed upon marriage, being exceptional, must be proved; and one who asserts that a marriage contracted in another state,

State, 77 Ala. 47, 54 Am. Rep. 43; Halbrook v. State, 34 Ark. 511, 36 Am. Rep. 17; State v. Schweitzer, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125; Green v. State, 21 Fla. 403, 58 Am. Rep. 670; Hiler v. People, 156 Ill. 511, 41 N. E. 181, 47 Am. St. Rep. 221; State v. Hughes, 35 Kan. 626, 57 Am. Rep. 195; Com. v. Jackson, 11 Bush (Ky.) 679, 21 Am. Rep. 225; State v. Hodgskins, 19 Me. 155, 36 Am. Dec. 742; Bird v. Com., 21 Grat. (Va.) 800; 1 Am. & Eng. Enc. Law (2d Ed.) 756; 4 Am. & Eng. Enc. Law (2d Ed.) 42; notes in 36 Am. Dec. 745, 47 Am. St. Rep. 228. The rule of the text applies also to an action for criminal conversation which is in the nature of a criminal prosecution. Morris v. Miller, 4 Burrows, 2057; Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164; Forney v. Hallacher, 8 Serg. & R. (Pa.) 159, 11 Am. Dec. 590; 8 Am. & Eng. Enc. Law (2d Ed.) 268.

⁴¹ Brown v. Beckett, 6 D. C. 253; Clark v. Cassidy, 62 Ga. 407. In an action for alimony, the burden is upon the plaintiff to establish the fact of marriage, unless admitted. See Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Collins v. Collins, 80 N. Y. 1; 2 Am. & Eng. Enc. Law (2d Ed.) 103. Where the fact of marriage is admitted in the pleadings, it need not be proved. Arthur v. Broadnax, 3 Ala. 557, 37 Am. Dec. 707.

⁴² Hunter v. Hunter, 111 Cal. 261, 43 Pac. 756, 52 Am. St. Rep. 180; Boulden v. McIntire, 119 Ind. 574, 21 N. E. 445, 12 Am. St. Rep. 453; Alabama, etc., R. Co. v. Beardsley, 79 Miss. 417, 30 So. 660, 89 Am. St. Rep. 660; Hadley v. Rash, 21 Mont. 170, 53 Pac. 312, 69 Am. St. Rep. 649; Estate of Megginson, 21 Or. 387, 28 Pac. 388, 14 L. R. A. 540.

which would be good at common law, is void because of some statutory prohibition or restriction in force in that state, has the burden of proving this fact.⁴³ So, also, the party charging that a marriage is void because of a prior subsisting marriage must prove the existence and validity of such prior marriage;⁴⁴ and where the prior marriage is established, he must prove that it has not been dissolved by death or divorce, although this may require him to prove a negative.⁴⁵

⁴³ *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *State v. Shattuck*, 69 Vt. 403, 38 Atl. 81, 60 Am. St. Rep. 936, 40 L. R. A. 428; *Lanctot v. State*, 98 Wis. 136, 73 N. W. 575, 67 Am. St. Rep. 800.

⁴⁴ *Patterson v. Gaines*, 6 How. (U. S.) 550; *Hunter v. Hunter*, 111 Cal. 261, 43 Pac. 756, 52 Am. St. Rep. 180. See, also, *Pittinger v. Pittinger*, 28 Colo. 308, 64 Pac. 195, and note in 14 L. R. A. 543.

⁴⁵ *Potter v. Clapp*, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322; *Boulden v. McIntire*, 119 Ind. 574, 21 N. E. 445, 12 Am. St. Rep. 453; *Schuchart v. Schuchart*, 61 Kan. 597, 60 Pac. 311, 78 Am. St. Rep. 342, 50 L. R. A. 180; *Hadley v. Rash*, 21 Mont. 170, 53 Pac. 312, 69 Am. St. Rep. 649.

CHAPTER V.

THE LEGAL CONSEQUENCES OF MARRIAGE.

§ 58. In General.

I. THE PERSONAL RELATIONS OF HUSBAND AND WIFE.

§ 59. Mutual Duties of Husband and Wife—Husband Head of Family.

60. Same—Duty of Wife to Obey Husband.
61. Right of Husband to Chastise or Restrain Wife.
62. Matrimonial Cohabitation—In General.
63. Same—Right of Husband to Fix Domicile.
64. The Duty of Support—Burial.
65. Right of Husband to Wife's Services.

II. THE PROPERTY RIGHTS OF HUSBAND AND WIFE.

§ 66. In General.

67. Husband's Interest in Wife's Property—Personalty.
68. Same—The Wife's Earnings.
69. Same—Chattels Real.
70. Same—Real Property.
71. Wife's Interest in Husband's Property.
72. Conveyances in Fraud of Marital Rights.
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§ 81. Disabilities of the Husband.

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VI. LIABILITY OF HUSBAND AND WIFE TO THIRD PERSONS.

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- 114. Same—Contracts Made by Wife as Husband's Agent.

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118. Same—Wife Living Apart from Husband—In General.
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122. Same—Effect of Wife's Adultery While Living Apart.
123. Same—Necessity and Effect of Notice not to Credit Wife.
124. Same—Effect of Divorce Proceedings or Decree.
125. Liability of Supposed Husband for Supplies Furnished to Woman Passing as Wife.
126. Liability for Wife's Torts.

VII. CRIMINAL LIABILITY OF HUSBAND AND WIFE.

- § 127. In General.
128. Crimes Against Each Other.

§ 58. In general.

At common law, the husband and wife become, by marriage, one person; that is, the legal existence of the wife is suspended during the marriage, or merged into that of the husband, under whose wing or cover she is, whence she is called a "*feme covert*," and her condition during marriage is called "coverture." The common law regards the husband as superior to the wife, and she is presumed, in general, to have no independent will, but to act under the coercion of her husband. Upon this principle of the legal union of person of husband and wife and the superiority of the husband depend almost all of the legal rights, duties, disabilities, and liabilities of either party growing out of the marriage.¹

¹ 1 Bl. Comm. 442.

It will be noted that there are here two conflicting notions,—one that the existence of the wife is suspended or merged into that of her husband; the other, that she still has a separate existence, but is under his domination or control. Some of the wife's disabilities depend upon one notion and some upon the other, and some, perhaps, upon either or both.² The doctrine of the legal identity of husband and wife is, of course, a pure fiction of the law, and we shall find that it has never been fully recognized by courts of equity,³ and is, for some purposes, disregarded even at common law. The doctrine that the wife is under the control of her husband is usually more or less in accordance with the fact, but even this is a mere presumption, which may sometimes be rebutted.

Our discussion of the legal consequences of marriage will involve the consideration of the effect of the marriage as between the parties themselves, and also as between either or both of them and third persons, as well as the disabilities, particularly of the wife, growing out of coverture. It will be found that the law relating to this subject has been greatly changed by statute, many of the most striking rules of the common law having been wholly abrogated. These changes, however, relate almost entirely to property rights and liabilities, and the capacity of the wife to contract with her husband

² See Schouler, Dom. Rel. § 34.

³ Though there are exceptional cases in which courts of equity depart from the common-law rules in regard to married women, these rules apply, in general, in courts of equity, as well as in courts of law. *Schilling v. Darmody*, 102 Tenn. 439, 52 S. W. 291, 73 Am. St. Rep. 892.

or with third persons. The personal duties and relations of the parties remain substantially unchanged.⁴ The extent of this "emancipation" of married women will depend, of course, upon the terms of the particular statute. In general, under the statutes, as in equity, the legal fiction of the unity of husband and wife is not recognized, and most or all of the disabilities depending upon that fiction have been removed. This change has been accomplished by degrees, one after another of the common-law disabilities being removed, until a married woman has in most states substantially the same standing before the law as a *feme sole*.⁵

We shall consider the legal consequences of marriage under several different heads, namely:

- (1) The personal relations of husband and wife.
- (2) The property rights of husband and wife.
- (3) The disabilities of coverture.
- (4) Transactions between husband and wife.
- (5) Rights of husband and wife against third persons.
- (6) Liabilities of husband and wife to third persons.
- (7) Criminal liability of husband and wife.

⁴ A statute which deals only with the property of the wife, and with contracts relating thereto, is not to be construed as intended to disturb the personal relations of husband and wife. *Snashall v. Metropolitan R. Co.*, 8 Mackey (D. C.) 399, 10 L. R. A. 746.

⁵ The character and extent of these changes will be noted in the succeeding sections of this chapter. It will be found that the legal fiction of marital unity is, in some states, not entirely abrogated. See *Heacock v. Heacock*, 108 Iowa, 540, 79 N. W. 353, 75 Am. St. Rep. 273.

I. THE PERSONAL RELATIONS OF HUSBAND AND WIFE.

§ 59. Mutual duties of husband and wife—Husband head of family.

The duties of husband and wife to love, honor, and cherish each other, and, taking each other for better or worse, to practice mutual kindness and forbearance, are well understood, but do not fall particularly within the cognizance of the law, since, in the nature of things, the law can enforce such duties only in a very imperfect manner.

At common law the husband is the head of the family, and has a right to regulate and control his household. In case of differences between husband and wife as to the management of the household, it is essential to family peace that one or the other of the parties should have the right to control, and the common law gives this right to the husband.⁶

The fact that the dwelling house used as the family residence is the property of the wife does not change the rule.⁷ Nor do the statutes enlarging the rights and privileges of married women, and giving to the wife the right to carry on any trade or business on her sole and separate account, deprive the husband of his common-law right to regulate and control his own household.⁸

Since matrimonial duties are imposed by law, a prom-

⁶ *Com. v. Wood*, 97 Mass. 225; *Com. v. Carroll*, 124 Mass. 30. A husband may refuse, in a proper case, to allow persons to visit his wife, even though such refusal be against her wishes. *Rex v. Middleton* (1819) 1 Chit. 654, 18 E. C. L. 192.

⁷ *Com. v. Wood*, 97 Mass. 225; *Com. v. Carroll*, 124 Mass. 30.

⁸ *Com. v. Wood*, 97 Mass. 225; *Com. v. Barry*, 115 Mass. 146; *Com. v. Carroll*, 124 Mass. 30. See, also, *Glover v. Alcott*, 11 Mich. 470, 485.

ise by either party to pay the other for performing these duties is without consideration, and therefore not enforceable, for an agreement to do what one is already required by law to do is no consideration for a promise.⁹ Moreover, contracts between husband and wife by which they mutually agree to perform their marital obligations are void because contrary to public policy. Not only would it be a delicate and difficult matter to determine whether there had been a breach of such a contract, and practically impossible to enforce a performance, but it would be highly improper and mischievous in most cases publicly to examine into every cause of domestic discord. A judicial inquiry into matters of this character would ordinarily do no good, but would rather work irreparable mischief. Such contracts, therefore, are forbidden by the soundest considerations of public policy.¹⁰

§ 60. Same—Duty of wife to obey husband.

It is the duty of the wife, at common law, to obey her husband,¹¹ and, since this is a duty imposed by the law, she cannot escape from it by declining to promise obedience at the altar. The omission of the word "obey" cannot help her, for the law supplies it, and an express stip-

⁹ See post, § 65.

¹⁰ *Miller v. Miller*, 78 Iowa, 177, 35 N. W. 409, 16 Am. St. Rep. 431. An agreement between husband and wife that the husband shall work for the wife, and in payment for such services the wife shall work for the husband, each being engaged in the usual and ordinary affairs of life, and that the product of such joint effort shall be the sole property of the wife, is without consideration, contrary to public policy, and void. *Dempster Mill Mfg. Co. v. Bundy*, 64 Kan. 444, 67 Pac. 816, 56 L. R. A. 739. See, also, post, § 65.

¹¹ 1 Bishop, Mar. Women, §§ 45, 49.

ulation that she need not obey is also unavailing, for such stipulation is void.¹²

The doctrine that the wife must obey her husband is well settled, and is clearly established by the authorities, though there is very little judicial authority on the subject.¹³ The duty of obedience, as a legal duty, appears to be of small practical advantage to the husband,¹⁴ and any attempt by him to enforce it would receive little encouragement from the courts, and might result in the wife's obtaining a divorce on the ground of cruelty.¹⁵ The true doctrine as to obedience in a properly constituted marriage seems to be that quaintly set forth by an ancient writer, to the effect that "God has given the man greater wit, better strength, better courage, to compel the woman to obey by reason or force;¹⁶ and to the woman beauty, fair countenance, and sweet words, to make the man obey her again for love. Thus

¹² See ante, § 10.

¹³ 2 Kent, Comm. 129; 1 Bishop, Mar. Women, §§ 45-49; Schouler, Dom. Rel. § 34. In *Oliver v. Oliver*, 1 Hagg. Consist. 361, 4 Eng. Ecc. 429, Sir William Scott (Lord Stowell) said: "It is the law of religion, and the law of this country, that the husband is intrusted with authority over his wife. He is to practice tenderness and affection, and obedience is her duty."

¹⁴ The position of the husband as the head of the family, and his legal right to the obedience of his wife, may be a serious disadvantage to him, as where, by reason thereof, he is held criminally liable for her conducting an illegal business in the family residence. See *Com. v. Wood*, 97 Mass. 229; *Com. v. Hill*, 145 Mass. 305, 14 N. E. 124.

¹⁵ See *Kelly v. Kelly*, L. R. 2 Prob. & Div. 31; and see, also, post, § 136.

¹⁶ But is not the wife constrained to obey as much by love as by reason or force?

each obeyeth and commandeth the other; and they two together rule the house so long as they remain in one.”¹⁷

§ 61. Right of husband to chastise or restrain wife.

Closely connected with the right of control is the right of punishment and restraint, without which the right of control could not be enforced. By the old common law, a husband had the right to chastise his wife moderately, though not in a violent or cruel manner.¹⁸ For this “wholesome exercise” he might use a stick not bigger than a man’s thumb. But for a long time, both in England and in America, this right has been denied to the husband, and an attempt to exercise it would render him liable for assault and battery, and entitle the wife to have him bound over to keep the peace, or to a divorce on the ground of cruelty.¹⁹

The husband was also allowed by the common law to exercise over the wife a “gentle restraint” in a proper case,²⁰ but it is doubtful whether this right now exists

¹⁷ Sir Thomas Smith, in *Commonwealth of England*, bk. 1, c. 2, quoted in Schouler, *Dom. Rel.* § 34, from *Bing. Inf. & Cov.* p. 184.

¹⁸ 1 Bl. Comm. 444; Bacon, *Abr.* “Baron and Feme” (B). See, also, *Adams v. Adams*, 100 Mass. 365, 1 Am. Rep. 111.

¹⁹ *Com. v. McAfee*, 108 Mass. 458, 11 Am. Rep. 388; *State v. Oliver*, 70 N. C. 61; 2 Am. & Eng. Enc. Law (2d Ed.) 963. See, also, *Poor v. Poor*, 8 N. H. 307, 29 Am. Dec. 664; *Perry v. Perry*, 2 Paige (N. Y.) 501.

²⁰ 2 Kent, Comm. 181. In the old case of *Rex v. Lister* (1721) 1 Strange, 478, it was declared to be the law that, where the wife will make an undue use of her liberty, either by squandering her husband’s estate, or by going into lewd company, it is lawful for the husband, in order to preserve his estate or honor, to lay the wife under a restraint. In this case (also reported in 8 Mod. 22) it was held that the husband who had consented to his wife’s living apart from him could not, by force, take her back and keep her in

except so far as may be necessary to prevent the wife from committing acts for which the husband may be held civilly or criminally liable. Inasmuch as the husband is liable at common law for his wife's torts, whether by word or deed, and also for her crimes in certain cases, it seems not unreasonable that he should have the right to control her actions either by confinement or punishment when necessary to protect himself from liability for her acts; but this right, so far as it exists, is probably much restricted, and will not be recognized further than may be necessary in each case.²¹

As might be expected, there is very little judicial authority on the subject of the right of the husband to punish, restrain, or control the wife. For obvious reasons, family difficulties and dissensions, unless of a serious character, are rarely brought to the attention of the courts. Moreover, the courts are not disposed to take cognizance of domestic broils of a trivial nature; not, indeed, because the domestic relations are not subject to the law, but because the evil of publicity would be greater, in most cases, than that complained of, and because, also, matters of this nature are best left to family government. Only in serious cases will the law interfere.²²

The question as to the husband's legal powers over the wife usually arises in one or another of four classes

restraint, and that, upon his having done so, she procured her release by habeas corpus. See, also, the late case, *Reg. v. Jackson*, [1891] 1 Q. B. 671, *Woodruff Cas.* 173.

²¹ Schouler, *Dom. Rel.* §§ 44, 45; 15 *Am. & Eng. Enc. Law* (2d Ed.) 813.

²² See *State v. Black*, 1 *Winst. (N. C.)* 266, 86 *Am. Dec.* 436; *State v. Rhodes*, *Phil. Law (N. C.)* 453, 98 *Am. Dec.* 78.

of cases: (1) Where he is prosecuted criminally for the abuse of his wife;²³ (2) where the wife sues for divorce on the ground of cruelty;²⁴ (3) where the husband is prosecuted for a crime committed by the wife, for which the law holds him responsible;²⁵ and (4) where he is sued for a tort committed by the wife.²⁶ Each case will be considered in its proper connection. In general it may be said that at present the husband's power of control and restraint is extremely limited, and extends no further than the necessities of the case require.

²³ A husband may be convicted of assault and battery for beating his wife. *Gaugler v. State* (Tex. Cr. App.) 22 S. W. 147; 2 Am. & Eng. Enc. Law (2d Ed.) 964. See, also, *People v. Winters*, 2 Park. Cr. R. (N. Y.) 10, *Woodruff Cas.* 173. It was formerly held otherwise in North Carolina unless some permanent injury was inflicted, or there was an excess of violence. *State v. Black*, 1 Winst. (N. C.) 266, 86 Am. Dec. 436; *State v. Rhodes*, Phil. Law (N. C.) 453, 98 Am. Dec. 78. But this doctrine has been repudiated. *State v. Oliver*, 70 N. C. 61. A man has no right to beat or strike his wife, even if she is drunk or insolent, and if he does so, and she dies as a result, he is guilty of manslaughter. *Com. v. McAfee*, 108 Mass. 458, 10 Am. Rep. 383.

²⁴ This class of cases is very numerous, and will be considered in connection with the subject of divorce.

The mere refusal of the husband to permit the wife to attend a particular church, of which she is a member, does not justify a separation. *Lawrence v. Lawrence*, 3 Paige (N. Y.) 267.

²⁵ Thus, the husband is criminally liable for his wife's conduct in using the family residence as a place of prostitution or for the illegal sale of liquors. In such case the husband has the legal right, and it is his duty, to prevent his wife from using the home for such purposes. *Com. v. Wood*, 97 Mass. 225; *Com. v. Hill*, 145 Mass. 305, 14 N. E. 124. In the case first cited the court said: "How far he may exercise force in restraining her is not precisely settled; but there can be no doubt that he may exercise as much power as may be reasonably necessary to prevent her, as well as other inmates of the house, from making it a brothel."

²⁶ For an extensive note on this subject, see 86 Am. Dec. 437.

Either spouse may, of course, use force against the other in self-defense.²⁷

§ 62. Matrimonial cohabitation—In general.

Matrimonial cohabitation is the living together of a man and a woman ostensibly as husband and wife.²⁸ It is the duty of husband and wife to live together, cohabitation being an essential element of the notion of marriage, and necessary to the full performance of the duties and the enjoyment of the privileges of the marital relation. Each consort has a right to the society of the other, and in England, when the right of cohabitation is denied by either party to the marriage, the other party may compel the performance of this duty by a suit for the restitution of conjugal rights.²⁹ No such

²⁷ Schouler, Dom. Rel. § 44; *People v. Winters*, 2 Park. Cr. R. (N. Y.) 10, Woodruff Cas. 173. See *Waring v. Waring*, 2 Phil. 132, 1 Eng. Ecc. 210.

²⁸ 1 Bishop, Mar., Div. & Sep. § 1669, quoted, together with other definitions, in *Cox v. State*, 117 Ala. 103, 23 So. 806, 67 Am. St. Rep. 166. See, also, *Kilburn v. Kilburn*, 89 Cal. 46, 26 Pac. 636, 27 Am. St. Rep. 447. A husband is living with his wife, in legal contemplation, even when away from home for a protracted period for business or other reasons, and ceases to live with her only when, with intention never to return, he deserts or abandons her. *Walton v. Walton*, 76 Miss. 662, 25 So. 166, 71 Am. St. Rep. 540.

²⁹ 3 Bl. Comm. 94. See *Harding v. Harding*, L. R. 11 Prob. Div. 111; *Tress v. Tress*, L. R. 12 Prob. Div. 128; *Field v. Field*, L. R. 14 Prob. Div. 26. Formerly, a decree for the restitution of conjugal rights might have been enforced by an attachment of the person for contempt, but this mode of enforcement has been taken away by statute. *Reg. v. Jackson* [1891] 1 Q. B. 671, Woodruff Cas. 173. In this case it was held that the husband could not, by force and confinement, compel the wife to return to and live with him. The only duty that can be enforced in this suit is that of living together. Where the parties are already cohabiting, the allowance of marital

remedy exists in this country, and the only relief available to the aggrieved party is a divorce on the ground of desertion.³⁰ Either party, however, may recover damages from a third person who wrongfully deprives him or her of the society of the other.³¹

Since matrimonial cohabitation is a duty as well as a right, it seems clear, on principle, that neither party to the marriage is entitled to compensation from the other party for the performance of this duty. Thus it has been held that a promissory note given by a husband to a trustee for the wife, who was living apart from him, to induce her to return, cannot be enforced. Such a note is without consideration, being given to induce the wife to do what she was already legally bound to do; and the agreement is also contrary to public policy, because promotive of separation between husband and wife.³² But the right of cohabitation may be forfeited

intercourse cannot be compelled. *Orme v. Orme*, 2 Add. 382, 2 Eng. Ecc. 354. An agreement for a separation is a bar to the suit. *Clark v. Clark*, L. R. 10 Prob. Div. 188.

³⁰ No court in this country has power to compel discordant husbands and wives to live together. *Baugh v. Baugh*, 37 Mich. 59. See, also, *Cruger v. Douglas*, 4 Edw. Ch. (N. Y.) 433; *Westlake v. Westlake*, 34 Ohio, 621, 32 Am. Rep. 397.

³¹ See post, § 106.

³² *Copeland v. Boaz*, 9 Baxt. (Tenn.) 223, 40 Am. Rep. 89. See, also, *Miller v. Miller*, 78 Iowa, 177, 35 N. W. 409, 16 Am. St. Rep. 431. In *Merrill v. Peaselee*, 146 Mass. 460, 16 N. E. 271, 4 Am. St. Rep. 334, it was held, by a divided court, that the consideration of such a note was illegal, even though the wife had left her husband for good cause, entitling her to a divorce, and had consulted counsel with a view to obtaining a divorce. The majority opinion was to the effect that matrimonial cohabitation cannot be made an article of trade, and is without the range of pecuniary considerations. The court declined to express an opinion as to the legality of an agreement not to prosecute divorce proceedings.

by misconduct justifying a separation or divorce. In such case, cohabitation is no longer a duty; and it has been held that a note given by a husband to his wife in consideration of her dismissing divorce proceedings against him, and returning to live with him, is valid, and may be enforced.³³ So, also, a promise to convey property upon such consideration is valid, and will be specifically enforced in equity.³⁴

§ 63. Same—Right of husband to fix domicile.

Since husband and wife are in law regarded as one person, they can have but one legal domicile so long as the relation upon which their legal identity depends remains unimpaired.³⁵ In case of difference between them as to the place of their domicile, the wishes of one of them must, of course, control; and it is well settled that the husband, as the head of the family, has the right to fix the matrimonial domicile without reference to the consent of the wife.³⁶ He has also the right to change his domicile as often as, and to any place where, his business, health, or comfort may require or his inclination may suggest; and whenever he in good faith

³³ Phillips v. Meyers, 82 Ill. 67, 25 Am. Rep. 295; Polson v. Stewart, 167 Mass. 211, 45 N. E. 737, 57 Am. St. Rep. 452; Adams v. Adams, 91 N. Y. 381, 43 Am. Rep. 675. For an exhaustive monographic note on the validity of agreements to abandon pending or contemplated divorce suits, including agreements to resume marital relations, see 60 L. R. A. 406.

³⁴ Moayon v. Moayon, 24 Ky. L. R. 1641, 72 S. W. 33, 60 L. R. A. 415.

³⁵ Harrison v. Harrison, 20 Ala. 629, 56 Am. Dec. 227.

³⁶ Schouler, Dom. Rel. § 37; Angier v. Angier, 7 Phila. (Pa.) 305; and cases cited in notes immediately following.

changes his domicile, the wife is bound to follow him, and, if she fails to do so without legal excuse, she is guilty of desertion.³⁷ In other words, the wife's legal domicile is that of her husband, and changes with his;³⁸ and this is true, although she may, in fact, be living apart from him,³⁹ even with his consent.⁴⁰ The right of the husband to fix the matrimonial domicile is deemed of such importance that he cannot relinquish it even by an antenuptial contract, such relinquishment being contrary to public policy, and therefore void.⁴¹

It seems that the husband's right to fix the matrimonial domicile is not an entirely arbitrary one, but must be exercised by him reasonably and in good faith. He cannot change his residence from mere whim or caprice, and compel his wife to follow him, to the detriment of her health or comfort. Probably, if a change of residence would injuriously affect the wife's health, she would be justified in refusing to follow him, and

³⁷ *Cutler v. Cutler*, 2 Brewst. (Pa.) 511; *Angier v. Angier*, 7 Phila. (Pa.) 305; 9 Am. & Eng. Enc. Law (2d Ed.) 768.

³⁸ *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Hood v. Hood*, 11 Allen (Mass.) 196, 87 Am. Dec. 709; *Suter v. Suter*, 72 Miss. 345, 16 So. 673, *Woodruff Cas.* 171; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Hicks v. Skinner*, 71 N. C. 539, 17 Am. Rep. 16; *Dougherty v. Snyder*, 15 Serg. & R. (Pa.) 84, 16 Am. Dec. 520; 10 Am. & Eng. Enc. Law (2d Ed.) 32.

³⁹ *Anderson v. Watt*, 138 U. S. 694; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125; *In re Wickes' Estate*, 128 Cal. 270, 60 Pac. 867, 49 L. R. A. 138; *Loker v. Gerald*, 157 Mass. 42, 31 N. E. 709, 34 Am. St. Rep. 282, 16 L. R. A. 497; *Hairston v. Hairston*, 27 Miss. 704, 61 Am. Dec. 530; *Hascall v. Hafford*, 107 Tenn. 355, 65 S. W. 423, 89 Am. St. Rep. 952.

⁴⁰ *Hood v. Hood*, 11 Allen (Mass.) 196, 87 Am. Dec. 709.

⁴¹ *Hair v. Hair*, 10 Rich. Eq. (S. C.) 163.

his compelling her to do so would be legal cruelty;⁴² and her refusal to follow him in such case is not desertion.⁴³

A wife may, in some circumstances, acquire a different domicile from that of her husband whenever it is necessary for her to do so, or when their interests conflict. It should be remembered that the doctrine of the legal unity of husband and wife created by the marriage is but a legal fiction, which, while it ought to be adhered to in every proper case, should not be applied so as to work hardship and injustice, as in cases where there is no real union of the parties, and their interests are antagonistic. In such a case, where the reason of the rule ceases to exist, the rule itself ceases to operate.⁴⁴ Thus the wife may acquire a separate domicile when she and her husband are permanently separated, as by a divorce *a mensa et thoro*,⁴⁵ or where she is abandoned or deserted by him.⁴⁶ So, also, a wife who has left her husband for good reason, as where he has

⁴² See Schouler, Dom. Rel. § 38; Angier v. Angier, 7 Phila. (Pa.) 305; Colvin v. Reed, 55 Pa. 375.

⁴³ Powell v. Powell, 29 Vt. 148, Woodruff Cas. 172. In this case it was held that the refusal of a wife to reside with her husband near his relatives was not desertion entitling him to a divorce, where it appeared that her peace of mind might be seriously disturbed by them.

It seems that the refusal of the wife to follow her husband to a foreign country, where her health might suffer, is not desertion. Haymond v. Haymond, 74 Tex. 414, 12 S. W. 90.

⁴⁴ See Colvin v. Reed, 55 Pa. 375.

⁴⁵ Barber v. Barber, 21 How. (U. S.) 588; Hunt v. Hunt, 72 N. Y. 218, 28 Am. Rep. 129.

⁴⁶ Watertown v. Greaves, 112 Fed. 183, 56 L. R. A. 865; Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549. Where a husband discards his wife and institutes divorce proceedings against her, she may ac-

given her cause for divorce, may acquire a separate domicile for the purpose of bringing a suit for divorce.⁴⁷ But a wife who deserts her husband without sufficient cause cannot acquire a separate domicile. In such case her domicile still follows his, notwithstanding such desertion.⁴⁸

2
§ 64. The duty of support—Burial.

The husband is bound to support the wife.⁴⁹ This duty, while universally recognized as of the utmost binding force in morals, is ordinarily enforced, not directly, by compelling the husband to perform it, but indirectly, by allowing third persons to supply the wife's needs and recover therefor from the delinquent husband.⁵⁰

In several states it is held that a court of equity

quire a separate domicile by a change of residence. *McGrew v. Mutual Life Ins. Co.*, 132 Cal. 85, 64 Pac. 103, 84 Am. St. Rep. 20.

⁴⁷ *Harteau v. Harteau*, 14 Pick. (Mass.) 181, 25 Am. Dec. 372; *Burtis v. Burtis*, 161 Mass. 508, 37 N. E. 740; *Atherton v. Atherton*, 155 N. Y. 129, 49 N. E. 933, 63 Am. St. Rep. 650, 40 L. R. A. 291; *Id.*, 181 U. S. 155; *Shreck v. Shreck*, 32 Tex. 579, 5 Am. Rep. 251; *Cook v. Cook*, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706.

⁴⁸ *Cheely v. Clayton*, 110 U. S. 701; *Loker v. Gerald*, 157 Mass. 42, 31 N. E. 709, 34 Am. St. Rep. 252. See note 39, *supra*. But in *Prater v. Prater*, 87 Tenn. 78, 9 S. W. 361, 10 Am. St. Rep. 623, it was held that a wife who deserted her husband and resided permanently in another state was not entitled, as his widow and a resident of the state of his domicile, to homestead rights in his estate.

See, generally, as to when a wife may acquire a separate domicile, monographic note in 84 Am. St. Rep. 27.

⁴⁹ 1 Bl. Comm. 442; 2 Kent, Comm. 146; *Callahan v. Patterson*, 4 Tex. 61, 51 Am. Dec. 712; and cases cited in notes immediately following.

A husband is not bound to support his wife's parents. *Commissioners v. Gansett*, 2 Bailey (S. C.) 320, 23 Am. Dec. 139.

⁵⁰ See post, § 115 et seq.

has inherent jurisdiction to compel a husband to pay to his wife an allowance for her support, known as alimony, where he refuses to support her, or she is living apart from him, although no decree of divorce is granted.⁵¹ But according to the weight of authority, a court of equity has no such power, and alimony cannot be granted in an independent suit, but only as an incident to divorce, unless the right to alimony as an independent right is created by statute,⁵² as is the case in many states.⁵³ At present, an independent suit for alimony may be maintained in most of the states, either under statutory provisions, or in accordance with the doctrine that courts of equity have inherent jurisdiction to grant such

⁵¹ *Hinds v. Hinds*, 80 Ala. 225, Woodruff, Cas. 240; *Pearce v. Pearce*, 132 Ala. 221, 31 So. 85, 90 Am. St. Rep. 901; *In re Popejoy*, 26 Colo. 32, 55 Pac. 1083, 77 Am. St. Rep. 223; *Graves v. Graves*, 36 Iowa, 310, 14 Am. Rep. 525; *Lockridge v. Lockridge*, 3 Dana (Ky.) 28, 28 Am. Dec. 52; *Helms v. Franciscus*, 2 Bland (Md.) 544, 20 Am. Dec. 402; *Crane v. Meginnis*, 1 Gill & J. (Md.) 463, 19 Am. Dec. 237; *Edgerton v. Edgerton*, 12 Mont. 122, 29 Pac. 966, 33 Am. St. Rep. 557; *Earle v. Earle*, 27 Neb. 277, 43 N. W. 118, 20 Am. St. Rep. 667; *Rhame v. Rhame*, 1 McCord Eq. (S. C.) 197, 16 Am. Dec. 597; *Purcell v. Purcell*, 4 Hen. & M. (Va.) 507; *Almond v. Almond*, 4 Rand. (Va.) 662, 15 Am. Dec. 781.

⁵² *Fischli v. Fischli*, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; *Parsons v. Parsons*, 9 N. H. 317, 32 Am. Dec. 362. See, also, *Muckenburg v. Holler*, 29 Ind. 139, 92 Am. Dec. 345; and cases cited in 2 Am. & Eng. Enc. Law (2d Ed.) 94.

⁵³ Statutes authorizing an independent suit for alimony, and defining the circumstances in which such suits may be maintained, have been passed in Arkansas, California, Georgia, Illinois, Indiana, Kansas, Massachusetts, Michigan, New Jersey, New Hampshire, New York, North Carolina, Tennessee, Wyoming, Wisconsin, and possibly other states. See *Finley v. Finley*, 9 Dana (Ky.) 52, 33 Am. Dec. 528; *Crane v. Meginnis*, 1 Gill & J. (Md.) 463, 19 Am. Dec. 237; *Winn v. Sanford*, 148 Mass. 39, 18 N. E. 677, 1 L. R. A. 512; *Bucknam v. Bucknam*, 176 Mass. 229, 57 N. E. 343, 49 L. R. A. 735.

relief.⁵⁴ In some states the failure of the husband to support his wife is made by statute a criminal offense in certain cases.⁵⁵

The fact that the husband is insane⁵⁶ or an infant⁵⁷ does not relieve him from the duty of supporting his wife.

The law does not prescribe the character of the support which the husband must afford to the wife. This is a question which he may decide for himself, provided only that the support be reasonably sufficient, considering the husband's circumstances and the wife's needs.⁵⁸ It seems, however, that, where the husband's means are ample, his duty extends further than merely supplying the bare necessities of life; and it has been held that making provision for his wife against a day when he may be incapacitated by disease or removed by death is at least so far a legal duty as to constitute a sufficient consideration to support a promise made to a third person to secure such provision.⁵⁹

⁵⁴ For a full discussion of this subject, see 2 Am. & Eng. Enc. Law (2d Ed.) 93-99, and exhaustive monographic note in 77 Am. St. Rep. 228.

⁵⁵ See 15 Am. & Eng. Enc. Law (2d Ed.) 814; *Poole v. People*, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 510; *People v. Malsch*, 119 Mich. 112, 77 N. W. 638, 75 Am. St. Rep. 381.

⁵⁶ *Matter of Taylor*, 9 Paige (N. Y.) 611; 16 Am. & Eng. Enc. Law (2d Ed.) 581. See, also, *McAnally v. Alabama Insane Hospital*, 109 Ala. 109, 19 So. 492, 55 Am. St. Rep. 923, 34 L. R. A. 223; *In re Stewart* (N. J. Eq.) 22 Atl. 122; *Shaw v. Thompson*, 16 Pick. (Mass.) 198, 26 Am. Dec. 655.

⁵⁷ See *Turner v. Trisby*, 1 Strange, 168; 16 Am. & Eng. Enc. Law (2d Ed.) 278.

⁵⁸ See post, § 115.

⁵⁹ *Buchanan v. Tilden*, 158 N. Y. 109, 52 N. E. 724, 70 Am. St. Rep. 454.

At common law a wife is not bound to support herself, since this duty falls upon the husband.⁶⁰ Nor is she bound to support him, however needy he may be, and whatever may be the extent of her separate estate.⁶¹ It has even been held that a contract by the wife to support her husband is void.⁶² In several states, however, the statutes provide for an allowance out of the wife's estate to a husband unable to support himself.⁶³ And in some states the wife is made liable along with the husband for family expenses.⁶⁴ Clearly, a married woman's separate estate may be charged with her support and that of her family when she has contracted for such support on her own credit, and not on behalf of her husband.⁶⁵ And where the wife's separate property is

⁶⁰ 1 Bishop, Mar. Women, §§ 894, 895. Her earnings, however, at common law, belong to her husband. See post, § 68.

⁶¹ See *Lyon v. Lyon*, 102 Ga. 453, 31 S. E. 34, 42 L. R. A. 194.

⁶² *Corcoran v. Corcoran*, 119 Ind. 138, 21 N. E. 468, 12 Am. St. Rep. 390, 4 L. R. A. 782.

⁶³ See *Livingston v. Superior Court*, 117 Cal. 633, 49 Pac. 836, 38 L. R. A. 175.

⁶⁴ Under such statutes, the wife was held liable for the items indicated in the following cases: *Murdy v. Skyles*, 101 Iowa, 549, 70 N. W. 714, 63 Am. St. Rep. 411 (medical services rendered to husband); *Neasham v. McNair*, 103 Iowa, 695, 72 N. W. 773, 64 Am. St. Rep. 202, 38 L. R. A. 847 (diamond shirt stud worn by husband); *Leake v. Lucas*, 65 Neb. 359, 91 N. W. 374, 93 N. W. 1019, 62 L. R. A. 190 (medical services rendered to husband); *Dodd v. St. John*, 22 Or. 250, 29 Pac. 618, 15 L. R. A. 717 (buggy bought by husband for family use). See note in 15 L. R. A. 717.

Such a statute does not apply to citizens of other states temporarily in the state, and will not be enforced by the courts of other states against their own citizens. *Mandell v. Fogg*, 182 Mass. 582, 66 N. E. 198, 94 Am. St. Rep. 667.

⁶⁵ 25 Am. & Eng. Enc. Law (2d Ed.) 405; *Priest v. Cone*, 51 Vt. 495, 31 Am. Rep. 695; *Krouskop v. Shontz*, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817. If the husband is not able to support his wife

used for the support of the family with her consent, as where husband and wife live in a house owned by the wife, the husband is not liable therefor to the wife, in the absence of an agreement to that effect, and she cannot, at least as against his creditors, claim compensation from him.⁶⁶

It is the right and duty of the surviving husband or wife to bury the body of the deceased consort, but it is generally held that the right of controlling the body ceases with the burial, and thereafter the disposition thereof belongs to the next of kin of the deceased. There is, however, some conflict of authority as to the respective rights in this connection of the surviving consort and the next of kin or personal representatives of the decedent.⁶⁷

§ 65. Right of husband to wife's services.

The wife's obligation to render family services is at

and her children, her separate property may be resorted to for that purpose. *Callahan v. Patterson*, 4 Tex. 61, 51 Am. Dec. 712.

⁶⁶ *Trefethen v. Lynam*, 90 Me. 376, 38 Atl. 335, 60 Am. St. Rep. 271.

⁶⁷ See *In re Weringer's Estate*, 100 Cal. 345, 34 Pac. 825; *Durell v. Hayward*, 9 Gray (Mass.) 248, 69 Am. Dec. 284; *Wynkoop v. Wynkoop*, 42 Pa. 293, 82 Am. Dec. 506; *Pettigrew v. Pettigrew*, 207 Pa. 313, 56 Atl. 878, 99 Am. St. Rep. 795; *Hackett v. Hackett*, 18 R. I. 155, 26 Atl. 42, 49 Am. St. Rep. 762; see, also, 8 Am. & Eng. Enc. Law (2d Ed.) 836-839, and note in 75 Am. St. Rep. 424.

A widow has the legal right to the custody of the body of her deceased husband for the purposes of preservation, preparation, and burial, and to maintain an action for damages for the unlawful mutilation and dissection thereof. *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 28 Am. St. Rep. 370.

The estate of an insane husband is liable for the wife's funeral expenses. *In re Stewart* (N. J. Eq.) 22 Atl. 122.

least coextensive with the husband's duty to support her.⁶⁸ And it has been held that the wife of an insane man could not claim compensation out of his estate for her services in caring for him, notwithstanding a contract for such compensation with his guardian.⁶⁹ And an agreement by a husband to pay his wife for her services as housekeeper is contrary to public policy and void.⁷⁰ In such case the promise to pay for services which the very existence of the matrimonial relation makes it the wife's duty to render is without consideration.⁷¹ And it has been so held even where the services rendered were outside of the wife's ordinary household duties, as where she works for her husband in his business, and this, notwithstanding a statute giving to the wife her earnings from her own labor on her sole and separate account. Such a statute contemplates services rendered to strangers, and not to her husband.⁷² Un-

⁶⁸ *Randall v. Randall*, 37 Mich. 563.

⁶⁹ *Grant v. Grant*, 41 Iowa, 88.

⁷⁰ *Michigan Trust Co. v. Chapin*, 106 Mich. 384, 64 N. W. 334, 58 Am. St. Rep. 490. To the same effect, see *Miller v. Miller*, 78 Iowa, 177, 35 N. W. 464, 42 N. W. 641, 16 Am. St. Rep. 431. Where a man and a woman cohabit as husband and wife in pursuance of a void marriage, which, however, the woman believes to be valid, the woman cannot, upon learning that the marriage was void, recover from the man for her services as housekeeper without a contract for such compensation, and in such case no such contract will be implied by law. *Robbins v. Potter*, 98 Mass. 532; *Cooper v. Cooper*, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721. But see *Higgins v. Breen*, 9 Mo. 493.

⁷¹ *Lee v. Savannah Guano Co.*, 99 Ga. 572, 27 S. E. 159, 59 Am. St. Rep. 243.

⁷² *Whitaker v. Whitaker*, 52 N. Y. 368, 11 Am. Rep. 711; *Birkbeck v. Ackroyd*, 74 N. Y. 356, 30 Am. Rep. 304; *Matter of Callister*, 153 N. Y. 294, 47 N. E. 268, 60 Am. St. Rep. 620; *Blaechinska v. Howard*

der some of the more liberal statutes, an agreement by the husband to pay his wife for extraordinary services performed by her for him would be valid.⁷³ Clearly, however, the statutes giving the wife the right to her separate earnings do not take from the husband his right to her services in connection with the discharge of her ordinary marital and domestic duties.⁷⁴

The husband's right to the wife's services includes not only her services rendered in connection with the care and management of the household and family, but also her services generally for whomsoever rendered. He has at common law an absolute right to whatever she may earn by her skill and labor during coverture. This rule, however, was subject to some exceptions even at common law, and has been generally abrogated by statute.⁷⁵

Mission, 130 N. Y. 497, 29 N. E. 755, 15 L. R. A. 215. See, also, *Citizens' St. R. Co. v. Twiname*, 121 Ind. 375, 23 N. E. 159, 7 L. R. A. 352. See note on the right of husband or wife to compensation for services rendered to each other, in 15 L. R. A. 215.

⁷³ *Carse v. Reticker*, 95 Iowa, 25, 63 N. W. 461, 58 Am. St. Rep. 421. That a husband may give his wife her earnings, see post, § 68.

⁷⁴ *Lee v. Savannah Guano Co.*, 99 Ga. 572, 27 S. E. 159, 59 Am. St. Rep. 243; *Citizens' St. R. Co. v. Triname*, 121 Ind. 375, 23 N. E. 159, 7 L. R. A. 352; *Mewhirter v. Hatten*, 42 Iowa, 288, 20 Am. Rep. 618.

The husband may, however, waive his right even to family services. Thus, the wife may recover for services in caring for her husband's blind and aged father, where the latter, with the husband's consent, has agreed to pay for such services. *Mason v. Dunbar*, 43 Mich. 407, 38 Am. Rep. 201. It would seem, however, that she could not recover from the husband on a promise by him to pay for such care of his father. See *Coleman v. Burr*, 93 N. Y. 17, 45 Am. Rep. 160.

⁷⁵ *Prescott v. Brown*, 23 Me. 305, 39 Am. Dec. 623, *Woodruff Cas.* 137. In this case it was held that a widow could not recover from

II. THE PROPERTY RIGHTS OF HUSBAND AND WIFE.

§ 66. In general.

As a necessary consequence of the unity of person of husband and wife, that is, the merger of her existence into his, we should expect that, at common law, whatever belongs to the wife at the time of the marriage, or comes to her in any manner thereafter, during coverture, would belong to the husband, and this we shall find to be the case, subject, however, to certain exceptions and qualifications. Thus, in general, all of the wife's personal property and the beneficial ownership of her realty is vested in the husband. In other words, at common law, a woman is stripped of her property by marriage. On the other hand, having ceased legally to exist, she can have no interest in the property of her husband. These striking but perfectly logical consequences of the common-law doctrine of marital unity have been largely done away with by statutes abolishing this legal fiction.

We shall now consider this subject in detail.

§ 67. Husband's interest in wife's property—Personalty.

In considering the right acquired by the husband to his wife's personal property, a distinction must be made between personal property which the wife has actually in her possession at the time of the marriage, and that which belongs to her, but which is not in her actual

a third person for services performed for him by her during coverture. The right of action in such case survives to the personal representatives of the husband, and not to the widow. See, also, post, § 68.

possession. An article of personal property of the first description is called a "chose (or thing) in possession"; articles of the latter class are known as "choses in action." A chose in action is merely a right to bring an action, either immediately or at some future time, to recover the actual possession of a chattel or the payment of a sum of money.⁷⁶ In a broad sense, the term includes rights of action founded upon torts committed against the person, as well as those founded upon contract or injuries to property.⁷⁷

At common law the husband acquires by the marriage an absolute right to all of his wife's personal property in possession, whether belonging to her at the time of the marriage or acquired afterwards. Marriage is said to operate as a gift to him of such property.⁷⁸

The wife's choses in action, such as debts due to her at the time of the marriage or afterwards, by note, bond, or otherwise, as well as legacies or distributive shares

⁷⁶ See, generally, 6 Am. & Eng. Enc. Law (2d Ed.) 2; *Salee v. Arnold*, 32 Mo. 532, 82 Am. Dec. 144.

⁷⁷ In *Smith v. Smith*, 98 Tenn. 101, 38 S. W. 439, *McAlister, J.*, said: "It is well settled that torts committed upon a married woman are comprehended within the definition of the term 'choses in action.'" So, also, in *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, *Bradley, J.*, said: "While a right of action for a personal injury may not be within the definition, as frequently given, of a chose in action, that term, in its broadest sense, does embrace it." See, also, *Chicago, etc., R. Co. v. Dunn*, 52 Ill. 260, 4 Am. Rep. 606; *Berger v. Jacobs*, 21 Mich. 215.

⁷⁸ 2 Bl. Comm. 433; 2 Kent, Comm. 143; 15 Am. & Eng. Enc. Law (2d Ed.) 820; *Washburn v. Hale*, 10 Pick. (Mass.) 429; *Com. v. Manley*, 12 Pick. (Mass.) 173; *Salee v. Arnold*, 32 Mo. 532, 82 Am. Dec. 144; *Burleigh v. Coffin*, 22 N. H. 118, 53 Am. Dec. 236; *Caffey v. Kelley*, *Busbee Eq. (N. C.)* 48, *Woodruff Cas.* 92; *Daniel v. Daniel*, 2 Rich. Eq. (S. C.) 115, 44 Am. Dec. 244.

of personalty, or any other chose in action, do not belong absolutely to the husband. He has the right to collect, sue for and recover, release or assign them, or in any way to reduce them to possession during coverture, and, if he so reduces them to possession, they become his absolutely, as in the case of any chose in possession. If he dies before reducing the property to possession, it goes to the wife. If she dies first, it constitutes a part of her estate, and does not strictly survive to the husband, but, as her administrator, he may recover it for his own benefit as sole distributee, subject, however, to the payment of the wife's debts. In other words, the marriage operates only as a qualified gift to the husband of the wife's choses in action, subject to the condition that he reduce them to possession during the coverture.⁷⁹

What constitutes a reduction to possession is sometimes difficult to determine, but there must be such an appropriation of the property as gives to the husband

⁷⁹ 2 Bl. Comm. 433; 2 Kent, Comm. 135; 15 Am. & Eng. Enc. Law (2d Ed.) 822; *Fleet v. Perrins*, L. R. 3 Q. B. 536; *Birmingham Waterworks Co. v. Hume*, 121 Ala. 168, 25 So. 806, 77 Am. St. Rep. 43; *Standeford v. Devoe*, 21 Ind. 404, 83 Am. Dec. 351; *Dunn v. Lancaster*, 4 Bush (Ky.) 581, 96 Am. Dec. 317; *Slocomb v. Breedlove*, 8 La. 143, 28 Am. Dec. 135; *Com. v. Manley*, 12 Pick. (Mass.) 173; *Locke v. McPherson*, 163 Mo. 493, 63 S. W. 726, 85 Am. St. Rep. 546; *Burleigh v. Coffin*, 22 N. H. 118, 53 Am. Dec. 236; *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17; *Weeks v. Weeks*, 5 Ired. Eq. (N. C.) 111, 47 Am. Dec. 358; *Ferrell v. Thompson*, 107 N. C. 420, 12 S. E. 109, 10 L. R. A. 361; *Robinson v. Woelpper*, 1 Whart. (Pa.) 179, 29 Am. Dec. 44; *Boozer v. Addison*, 2 Rich. Eq. (S. C.) 273, 46 Am. Dec. 43; *Harris v. Taylor*, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576; *Hill v. Wynn*, 4 W. Va. 453; note in 46 Am. Dec. 47.

for some moment of time absolute dominion over it without any concurrence of the wife;⁸⁰ some act on his part evincing an intention to appropriate the chose to his own use.⁸¹

§ 68. Same—The wife's earnings.

At common law, since the husband is entitled to the wife's services and to all personal property acquired by her, he has the right to whatever she may earn during coverture by her labor and skill.⁸² It follows that property purchased with such earnings belongs to him;⁸³ and the earnings and property purchased therewith are subject to the claims of his creditors.⁸⁴

A husband may give his wife's earnings to her as her separate property, just as he may give any other property to her.⁸⁵ Such a gift, in equity, will create an equi-

⁸⁰ *Nicholson v. Drury Bldgs. Estate Co.*, 17 Ch. Div. 48.

⁸¹ *Pierson v. Smith*, 9 Ohio St. 554, 75 Am. Dec. 486. See 2 Kent, Comm. 136; 15 Am. & Eng. Enc. Law (2d Ed.) 825; *Standeford v. Devoe*, 21 Ind. 404, 83 Am. Dec. 351; *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85; note in 37 Am. Dec. 577.

This subject is now of little importance in view of the statutes taking away the husband's common-law rights. Extended discussion is therefore deemed unnecessary.

⁸² 15 Am. & Eng. Enc. Law (2d Ed.) 832; *McLemore v. Pinkston*, 31 Ala. 266, 68 Am. Dec. 167; *Belford v. Crane*, 16 N. J. Eq. 265, 84 Am. Dec. 155; *Washburn v. Hale*, 10 Pick. (Mass.) 429; *Skillman v. Skillman*, 15 N. J. Eq. 478, 82 Am. Dec. 279; *Cramer v. Reford*, 17 N. J. Eq. 367, 90 Am. Dec. 594. See, also, ante, § 65.

⁸³ *Cramer v. Reford*, 17 N. J. Eq. 367, 90 Am. Dec. 594.

⁸⁴ *Cramer v. Reford*, 17 N. J. Eq. 367, 90 Am. Dec. 594; *Campbell v. Bowles*, 30 Grat. (Va.) 362; *Bailey v. Gardner*, 31 W. Va. 94, 5 S. E. 636, 13 Am. St. Rep. 847.

⁸⁵ See cases cited in notes immediately following.

There is some conflict of authority as to the validity of such gifts as against the husband's creditors. The particular circumstances

table separate estate. But even in equity the wife's earnings cannot become her property without a clear, express, and irrevocable gift, or some distinct affirmative act of the husband divesting himself of them or setting them apart for her separate use.⁸⁶ Under statutes permitting direct dealings between husband and wife, such gifts are, of course, valid, at least as between the parties.⁸⁷ A common form of gift arises where the husband consents to the wife's carrying on some business requiring her labor and skill on her own account,⁸⁸ as, for example, where he agrees that she may keep boarders.⁸⁹

of each case, and, in some instances, statutory provisions, have affected the decisions. See, generally, *McNaught v. Anderson*, 78 Ga. 499, 3 S. E. 668, 6 Am. St. Rep. 278; *Carse v. Reticker*, 95 Iowa, 25, 63 N. W. 461, 58 Am. St. Rep. 421; *Belford v. Crane*, 16 N. J. Eq. 265, 84 Am. Dec. 155; *Cramer v. Reford*, 17 N. J. Eq. 367, 90 Am. Dec. 594; *McKinnon v. McDonald*, 4 Jones Eq. (N. C.) 1, 72 Am. Dec. 574; *Yake v. Pugh*, 13 Wash. 78, 42 Pac. 528, 52 Am. St. Rep. 17; *Bailey v. Gardner*, 31 W. Va. 94, 5 S. E. 636, 13 Am. St. Rep. 847. And see note in 58 Am. St. Rep. 495, 496.

⁸⁶ *McLemore v. Pinkston*, 31 Ala. 266, 68 Am. Dec. 167; *Skillman v. Skillman*, 15 N. J. Eq. 478, 82 Am. Dec. 279.

⁸⁷ As to the validity of gifts between husband and wife, see, generally, post, §§ 95-97.

⁸⁸ *Carter v. Smith*, 82 Ala. 334, 60 Am. Rep. 738; *Coughlin v. Ryan*, 43 Mo. 99, 97 Am. Dec. 375; *Kerr v. Vasser*, 2 Ired. Eq. (N. C.) 553, 40 Am. Dec. 443; *Penn v. Whitehead*, 17 Grat. (Va.) 503; *Jones v. Reid*, 12 W. Va. 350, 29 Am. Rep. 455. See, also, *Partridge v. Stocker*, 36 Vt. 108, 84 Am. Dec. 664, and note.

⁸⁹ *Carse v. Reticher*, 95 Iowa, 25, 63 N. W. 461, 58 Am. St. Rep. 421. In *McNaught v. Anderson*, 78 Ga. 499, 3 S. E. 668, 6 Am. St. Rep. 278, it was held that an agreement by a husband with his wife that she might take boarders and own the proceeds was valid, and that land paid for with such proceeds belonged to the wife. In this case Chief Justice Bleckley said: "The legal unity of husband and wife has, in Georgia, for most purposes, been dissolved, and a legal

Where a husband makes to his wife an allowance for household expenses, anything she may save out of such allowance belongs to him, unless it clearly appears that he intended that the savings should be hers. But the husband may give the wife her savings as well as her earnings, and where the facts establish such a gift, the wife's savings are her separate property.⁹⁰

The general propositions that a husband is bound to support and maintain his wife, and that he is entitled to her labor and earnings, are undisputed; and while they actually live together in the usual course of the marital relation, very little difficulty arises in the application of these principles. It may be otherwise, however, in cases in which, although the legal relation still subsists, the parties have, in fact, become alienated and separated, and their interests possibly conflict. The effect of such a state of facts upon the husband's duty to support the wife will be considered later.⁹¹ Since the

duality established. A wife is a wife, and not a husband, as she was formerly. Legislative chemistry has analyzed the conjugal unit, and it is no longer treated as an element, but as a compound. A husband can make a gift to his own wife, although she lives in the house with him, and attends to her household duties, as easily as he can make a present to his neighbor's wife. This puts her on an equality with other ladies, and looks like progress. Under the new order of things, when he induces her to enter into the business of keeping boarders, and promises to let her have all the proceeds, he is allowed to keep his promise if she keeps the boarders. It would seem that the law ought to tolerate him in being faithful to his word in such a matter, even though he has pledged it only to his wife, and we think it does."

⁹⁰ *Kerr v. Vasser*, 2 Ired. Eq. (N. C.) 553, 40 Am. L. 443. See, also, *McKinnon v. McDonald*, 4 Jones Eq. (N. C.) 1, 72 Am. Dec. 574; *Abbott v. Wetherby*, 6 Wash. 507, 33 Pac. 1070, 36 Am. St. Rep. 176; *Schouler*, Dom. Rel. § 161.

⁹¹ See post, §§ 118-122.

duty of the husband to support the wife and her duty to render services to him are largely correlative duties, it would seem that, in any case in which the husband would not be liable to a third person for necessities furnished to his wife, he could not recover from a third person for services rendered to the latter by the wife. This, however, is not necessarily the case, as will appear when the conditions of the husband's liability are considered.⁹² It seems clear, on principle, that where the husband abandons his wife, or by his misconduct compels her to leave him, he forfeits his right to her services, and cannot recover from a third person, by whom she has been employed.⁹³ So, also, where the parties separate by mutual consent, and the wife is employed by a third person, receiving her own wages and supporting herself, the husband cannot recover from her employer, although he might still be legally bound to support his wife. In such case his assent to her receiving her own wages would be presumed,⁹⁴ and, as has been stated above, such assent, actually given, would preclude him from claiming them even where the parties are living together, since it would amount to a gift to her of her earnings.

In many states the wife's earnings are now made her

⁹² See post, §§ 118-122.

Clearly, the fact that the wife, by her misconduct, has forfeited her right to support, does not require that the husband, who is without fault, should lose his right to her services.

⁹³ See post, § 90.

⁹⁴ *Norcross v. Rodgers*, 30 Vt. 588, 73 Am. Dec. 323. In so holding the court said: "It is very probable that if the plaintiff [the husband] had notified the defendant, before payment to the wife, not to pay her, and that he claimed her wages, the defendant might not have been justified in paying her."

separate property by express statutory provisions.⁹⁵ But to have this effect the statute must so provide in express terms; the husband's right to his wife's earnings is not taken away by implication by statutes securing to the wife, in general terms, property owned or acquired by her.⁹⁶ Moreover, a statute permitting the wife to perform labor or services on her sole and separate account, or providing that property acquired by her by labor or services so performed shall be her separate property, does not necessarily deprive the husband of the benefit of the wife's services. Under such a statute she may elect to work for herself and retain her own earnings, but unless she makes such an election, the husband's common-law right remains unimpaired.⁹⁷ And, in general, the statutes apply only to labor and services performed for third persons, and not to labor or services performed for the husband, even though of an extraordinary character, as where she works for him in his business.⁹⁸ Plainly the husband's right to the wife's services in connection with her household duties is not affected by the statutes.⁹⁹

The statutes giving to the wife the right to her own

⁹⁵ *Harmon v. Old Colony R. Co.*, 165 Mass. 100, 42 N. E. 505, 52 Am. St. Rep. 499; *Dayton v. Walsh*, 47 Wis. 113, 2 N. W. 65, 32 Am. Rep. 757. See 25 Am. & Eng. Enc. Law (2d Ed.) 357.

⁹⁶ *Bailey v. Gardner*, 31 W. Va. 94, 5 S. E. 636, 15 Am. St. Rep. 847. See, also, *Porter v. Dunn*, 131 N. Y. 314, 30 N. E. 122.

⁹⁷ *McCluskey v. Provident Sav. Inst.*, 103 Mass. 300; *Birkbeck v. Ackroyd*, 74 N. Y. 356, 30 Am. Rep. 304; *Porter v. Dunn*, 131 N. Y. 314, 30 N. E. 122. See, also, *Hamilton v. Booth*, 55 Miss. 60, 30 Am. Rep. 500.

⁹⁸ See ante, § 65.

⁹⁹ See ante, § 65.

earnings and services do not relieve the husband from the duty of supporting the wife.¹⁰⁰

§ 69. Same—Chattels real.

A chattel real is a species of property partaking of the nature both of real and of personal property. The only example known to American law is a lease of land for a term of years. By marriage the husband becomes entitled to the wife's chattels real (i. e., her interest as lessee of lands), and may dispose of them by sale, mortgage, or otherwise during the coverture, and they are liable to be sold for his debts. But he cannot dispose of them by will, and, upon the death of either husband or wife, her chattels real not disposed of by the husband during the coverture vest absolutely in the survivor.¹⁰¹ Cases for the application of these principles have rarely arisen in this country, and the law of the subject is practically obsolete.

§ 70. Same—Real property.

The husband does not, by the marriage, become the owner of the wife's real estate. This remains hers, and upon her death goes to her heirs; but the husband is entitled during coverture to the rents, issues, and profits, or, in other words, to the beneficial enjoyment of the land. This interest he can convey by his sole deed, and it is subject to sale on execution for his debts, and it

¹⁰⁰ *Boikbeck v. Ackroyd*, 74 N. Y. 356, 30 Am. Rep. 304; *Coleman v. Burr*, 93 N. Y. 17, 45 Am. Rep. 160.

¹⁰¹ 2 Bl. Comm. 434; 1 Bishop, Mar. Women, 183-205; 2 Kent, Comm. 134; 19 Am. & Eng. Enc. Law (2d Ed.) 819; *Riley v. Riley*, 19 N. J. Eq. 229, *Woodruff Cas.* 104.

cannot be defeated by any act of the wife.¹⁰² His interest, however, lasts only during coverture, unless there is issue born alive of the marriage, in which case, after the wife's death, if he survives, he continues to enjoy the property for life. This right is distinct from his marital right to the land during coverture, though of the same extent, except as to the period of enjoyment, and is known as "curtesy."¹⁰³

The husband has no marital interest in realty owned by the wife as her statutory separate estate, or as her equitable separate estate, when his right is excluded by the statute or the instrument creating the estate.¹⁰⁴ He is, however, entitled to curtesy in either her statutory or equitable separate estate, if the common-law requisites exist, unless the statute or instrument creating the estate provides otherwise. In some states, however, curtesy is abolished by statute.¹⁰⁵

§ 71. Wife's interest in husband's property.

The wife acquires by the marriage no interest whatever in the husband's personal property during his life,¹⁰⁶ although, as we have seen, she is entitled to support. But after the husband's death intestate, if she survives

¹⁰² 2 Bl. Comm. 433; 2 Kent, Comm. 130; *Junction R. Co. v. Harris*, 9 Ind. 184, 68 Am. Dec. 618; *Babb v. Perley*, 1 Me. 6, *Woodruff Cas.* 105; *Burleigh v. Coffin*, 22 N. H. 118, 53 Am. Dec. 236; *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740.

¹⁰³ The subject of curtesy will be found fully treated in works on the law of real estate. See 8 Am. & Eng. Enc. Law (2d Ed.) 506.

¹⁰⁴ This follows necessarily from the nature of the estate as a separate estate. See post, §§ 74, 75.

¹⁰⁵ See 8 Am. & Eng. Enc. Law (2d Ed.) 521.

¹⁰⁶ This is a necessary consequence of the fact that by marriage she, in law, ceases to exist.

him, she may claim a distributive share of the personalty owned by him at the time of his death. There seems to be some doubt as to whether the wife had such a right at common law; but by the English statute of distributions enacted in 1670 and 1671 (22 & 23 Car. II. c. 10) it was provided that the widow of a deceased intestate was entitled to one-third or one-half of the husband's personal property remaining after the payment of his debts, the proportion depending upon whether there were or were not children of the marriage. This share was called the widow's "thirds" or "reasonable parts."¹⁰⁷ The widow's right to a distributive share of her husband's personalty is now regulated in all of the states by statute.

As the wife has no interest in the personal estate of her husband during his life, but he is the absolute owner thereof, he may, except as against his creditors, dispose of it in any manner he sees fit, although he thereby defeats the wife's prospective share as distributee.¹⁰⁸ If, however, the disposition is merely colorable, and made for the purpose of defeating the wife's claim, the husband reserving the control and dominion over the prop-

¹⁰⁷ 2 Bl. Comm. 515, 516; 2 Kent, Comm. 427; Schouler, Dom. Rel. § 205.

¹⁰⁸ Crofut v. Layton, 68 Conn. 91, 35 Atl. 783; Small v. Small, 56 Kan. 1, 42 Pac. 323, 54 Am. St. Rep. 581, 30 L. R. A. 243; Dickerson's Appeal, 115 Pa. 198, 8 Atl. 64, 2 Am. St. Rep. 547; Lines v. Lines, 142 Pa. 149, 21 Atl. 809, 24 Am. St. Rep. 487; note in 24 Am. St. Rep. 490. See, also, Schmoltz v. Schmoltz, 116 Mich. 692, 75 N. W. 135; Sanborn v. Goodhue, 28 N. H. 48, 59 Am. Dec. 398.

The husband may also dispose of his personal and real property (subject to dower) by will, and thus defeat the wife's claim, except where and to the extent to which this right is restricted by statute. Rood, Wills, §§ 99-102.

erty until his death, it is held by some courts that the wife, after the husband's death, may have the transfer set aside as a fraud upon her, and secure her distributive share.¹⁰⁹ Although there is some apparent conflict among the authorities and some confusion in the minds of the judges on this subject, this holding seems correct,—not, however, because the husband may not transfer his property so as to defeat, or even for the purpose of defeating, his wife's claim, but because, in the case stated, he has made no effective transfer. And it has been held that a transfer by the husband, whether voluntary or for a valuable consideration, and whether to take full effect at once or after his death, provided it is not revocable by him so as to be a will in disguise, is valid as against the widow, although made for the purpose of defeating her claim.¹¹⁰ This appears to be absolutely sound, for whatever be the motive or manner of transfer by the husband, provided it be complete and irrevocable, it cannot be a fraud upon the wife, for the plain reason that she has no right to the property during the husband's life. The mere chance that she may succeed

¹⁰⁹ *Smith v. Smith*, 22 Colo. 480, 46 Pac. 128, 55 Am. St. Rep. 142, 34 L. R. A. 89; *Id.*, 24 Colo. 527, 52 Pac. 790, 65 Am. St. Rep. 251; *Walker v. Walker*, 66 N. H. 390, 31 Atl. 14, 49 Am. St. Rep. 616, 27 L. R. A. 799; *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211.

¹¹⁰ *Cameron v. Cameron*, 10 Smedes & M. (Miss.) 394, 48 Am. Dec. 759; *Holmes v. Holmes*, 3 Paige (N. Y.) 363; *Lightfoot v. Colgin*, 5 Munf. (Va.) 42; and cases cited in note 108, *supra*.

The mere reservation of the power of revocation, which is not exercised, does not render the transfer testamentary and void as against the wife. *Dickerson's Appeal*, 115 Pa. 198, 8 Atl. 64, 2 Am. St. Rep. 547; *Lines v. Lines*, 142 Pa. 149, 21 Atl. 809, 24 Am. St. Rep. 487.

to some of his property after his death is not such an interest in property as will weigh against his absolute ownership of it—including the power of disposition—during his life.

These principles apply to the disposition of real property as well as personalty, where the wife succeeds to real property as heir of the husband, and not merely by way of dower.¹¹¹

The wife has no interest in the husband's real estate during his life, but after his death, whether there are children of the marriage or not, she, if surviving, is entitled to dower, which is a life interest in one-third of the real estate owned by him at the time of his death, or at any time during coverture. Unlike her distributive share of the husband's personalty, her dower interest is a matter of legal right, and cannot be defeated by any act of the husband. If he disposes of the land by deed or will, the grantee or devisee takes it subject to the widow's claim to dower. The common law of dower has been modified in some states by statute, and in several states both dower and curtesy have been abolished, and other interests substituted therefor.¹¹²

¹¹¹ Jones v. Somerville, 78 Miss. 269, 28 So. 940, 84 Am. St. Rep. 627. A colorable conveyance of realty by a husband shortly before his death, made to defeat the wife's dower interest, will be set aside where, by statute, dower is limited to lands of which the husband died seized. Thayer v. Thayer, 14 Vt. 107, 39 Am. Dec. 211. See, also, Stroup v. Stroup, 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523.

¹¹² 1 Bishop, Mar. Women, § 239 et seq.; 10 Am. & Eng. Enc. Law (2d Ed.) 122; McCauley v. Grimes, 2 Gill & J. (Md.) 323, Woodruff Cas. 114; In re Pulling's Estate, 97 Mich. 375, 56 N. W. 765, Woodruff Cas. 111; In re Alexander, 53 N. J. Eq. 96, 30 Atl. 817, Woodruff Cas. 109; Church v. Bull, 2 Denio (N. Y.) 430, Woodruff Cas. 117;

§ 72. Conveyances in fraud of marital rights.

A conveyance or other transfer of property by a woman about to marry, made without the knowledge of the intended husband, with intent to defeat his marital rights in the property, is a fraud upon him, and he may have the transfer set aside after the marriage by a suit in equity;¹¹³ but such a transfer, made without fraudulent intent, may be valid.¹¹⁴

The above principle applies also to transfers by the prospective husband. Thus a conveyance of real estate made by a man about to marry, without the knowledge of his intended wife, and for the purpose of defeating her dower right or other marital right, is a fraud upon her, and she may have the transfer, so far as it affects her interest, set aside either during the lifetime of her husband,¹¹⁵ or after his death.¹¹⁶ The transfer will be

Price v. Price, 124 N. Y. 589, 27 N. E. 383, *Woodruff Cas.* 115; *Gelzer v. Gelzer*, 1 *Bailey Eq.* (S. C.) 387, *Woodruff Cas.* 115.

The subject of dower will be found fully discussed in works on the law of real estate.

¹¹³ 2 *Kent*, Comm. 175; *Schouler*, Dom. Rel. § 181; 2 *Pomeroy*, Eq. Jur. § 1113; *Ramsay v. Joyce*, 1 *McMul. Eq.* (S. C.) 236, 37 *Am. Dec.* 550; *Mauss v. Durant*, 2 *Rich. Eq.* (S. C.) 404, 46 *Am. Dec.* 65; *Waller v. Armistead*, 2 *Leigh* (Va.) 11.

¹¹⁴ *McClure v. Miller*, 1 *Bailey Eq.* (S. C.) 107, 21 *Am. Dec.* 522; *Fletcher v. Ashley*, 6 *Grat.* (Va.) 332; *Gregory v. Winston*, 23 *Grat.* (Va.) 102.

¹¹⁵ *Murray v. Murray*, 115 *Cal.* 266, 47 *Pac.* 37, 56 *Am. St. Rep.* 97, 37 *L. R. A.* 626; *Petty v. Petty*, 9 *B. Mon.* (Ky.) 215, 39 *Am. Dec.* 501; *Cranson v. Cranson*, 4 *Mich.* 230, 66 *Am. Dec.* 534; note in 39 *Am. Dec.* 218.

¹¹⁶ *Bookout v. Bookout*, 150 *Ind.* 63, 49 *N. E.* 824, 65 *Am. St. Rep.* 350; *Murray v. Murray*, 90 *Ky.* 1, 13 *S. W.* 244, 8 *L. R. A.* 95; *Swain v. Perine*, 5 *Johns. Ch.* (N. Y.) 482, 9 *Am. Dec.* 318; *Arnegard v. Arnegard*, 7 *N. D.* 475, 75 *N. W.* 797, 41 *L. R. A.* 258.

In *Ward v. Ward*, 63 *Ohio St.* 125, 57 *N. E.* 1095, 81 *Am. St. Rep.*

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set aside, however, only to the extent of the wife's interest.¹¹⁷ And if made with her knowledge and consent, it is, of course, not fraudulent as to her.¹¹⁸

§ 73. Wife's pin money—Paraphernalia—Equity to settlement.

"Pin money" is an allowance made to the wife by the husband for her current personal expenses for dress, adornment, etc. Pin money is intended for expenditure, and not for accumulation; hence the wife cannot recover arrears of unexpended pin money, at least not more than one year's arrears, from her husband or his estate, and her personal representatives cannot recover even for one year, the trust being solely for the personal benefit of the wife. Pin money is practically unknown in America, and of rare occurrence in England.¹¹⁹

The wife's "paraphernalia" (from the Greek, meaning "besides dower") consists of suitable ornaments or

621, 51 L. R. A. 858, it was held that a conveyance made by a widower, immediately before his second marriage, to his children by his former marriage, with no other consideration than love and affection, and without the knowledge of his intended second wife, was fraudulent as to her, whether actual fraud was intended or not. But see contra, *Alkire v. Alkire*, 134 Ind. 350, 32 N. E. 571; *Hamilton v. Smith*, 57 Iowa, 15, 10 N. W. 276, 42 Am. Rep. 39; *Butler v. Butler*, 21 Kan. 521, 30 Am. Rep. 441.

¹¹⁷ *Arnegard v. Arnegard*, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258; *Dudley v. Dudley*, 76 Wis. 567, 45 N. W. 602, 8 L. R. A. 814.

¹¹⁸ *Clark v. Clark*, 183 Ill. 448, 56 N. E. 82, 75 Am. St. Rep. 115; *Murray v. Murray*, 90 Ky. 1, 13 S. W. 244, 8 L. R. A. 95.

¹¹⁹ See *Bispham*, *Principles of Equity*, § 108; 2 *Pomeroy*, *Eq. Jur.* § 1111; *Schouler*, *Dom. Rel.* § 160; 1 *Bishop*, *Mar. Women*, §§ 229-238. See, also, *Miller v. Williamson*, 5 Md. 219; *McKinnon v. McDonald*, 4 Jones Eq. (N. C.) 1, 72 Am. Dec. 574. The allowance was not always small. Thus, £13,000 a year was allowed in one case. *Schouler*, *Dom. Rel.* § 160, note.

wearing apparel which she had at the time of her marriage, or which are given to her by her husband before or after marriage. These are the property of the husband, and, with the probable exception of necessary clothing, they may be sold or otherwise disposed of by him during coverture, and are liable to the claims of his creditors. But he cannot dispose of them by will, and, if undisposed of at the time of his death, they become thenceforth the property of the wife if she survives, subject, however, to the claims of the husband's creditors.¹²⁰

The wife's "equity to a settlement" is a right which she has in equity to an allowance out of her own property, real or personal, for the support of herself and her children, where the husband has failed to provide for them. This right is enforced only in equity, and extends to property to which the husband is seeking to enforce his marital right. The amount settled may be a part, or, in extreme cases, the whole, of the fund which the husband is seeking to subject.¹²¹

The rights considered in this section are now of little or no consequence, since far more extensive rights are enjoyed by married women under modern statutes.

§ 74. Wife's equitable separate estate.

The injustice and hardship of the rules of the common

¹²⁰ 2 Bl. Comm. 435, 436; Schouler, Dom. Rel. § 208; 1 Bishop, Mar. Women, §§ 216-228; Howard v. Menifee, 5 Pike (Ark.) 668, Woodruff Cas. 93; Hawkins v. Providence, etc., R. Co., 119 Mass. 596, 20 Am. Rep. 353.

¹²¹ 1 Bishop, Mar. Women, §§ 624-696; 2 Pomeroy, Eq. Jur. §§ 1114-1118; 15 Am. & Eng. Enc. Law (2d Ed.) 837-845; Helms v. Franciscus, 2 Bland Ch. (Md.) 544, 20 Am. Dec. 402; Poindexter v. Jeffries, 15 Grat. (Va.) 363, Woodruff Cas. 161.

law affecting the wife's property gave rise, at an early date, to what is known as the wife's equitable separate estate. An equitable separate estate is an estate, recognized only in equity, consisting of property given to or settled upon a wife for her separate use, to the exclusion, more or less complete, of the marital rights of the husband. The estate may consist of either personal or real property, and may be created either before^{121a} or after marriage. It is always a trust estate; that is, the legal title is vested in a trustee, who holds the property for the benefit of the wife. If no trustee is named in the instrument creating the estate,—which may be either a deed or a will,—the court will supply a trustee, usually considering the husband as such. The property may be bestowed upon the wife by either the husband or a stranger. No particular words are necessary to create the estate, but it must clearly appear from the instrument creating it, whether deed or will, or from the nature of the transaction, that the property was intended for the separate use of the wife. The safest way to create such an estate is to settle the property to the “sole and separate use” of the wife, as these words have a well-recognized meaning.

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The extent of the wife's power over her equitable separate estate, as well as the extent to which the husband's rights are excluded, depend wholly upon the intention of the settler as expressed in the language used in creating the estate. As the principal object of such an estate is to

^{121a} Although the estate may be created before marriage, its peculiar character does not attach until that event. Until the marriage, the beneficiary has all the powers over the estate as any feme sole has over her property.

secure to the wife the separate use of her property during coverture, its peculiar character will ordinarily cease upon the termination of the coverture.

The subject of equitable separate estates belongs more properly to a course in equity jurisprudence, and no treatment of it will be attempted here.¹²²

§ 75. Wife's statutory separate estate.

In most, if not all of the states, statutes secure to a married woman some or all of the property belonging to her at the time of marriage or thereafter acquired. This estate is known as the wife's statutory separate estate. It differs from her equitable separate estate in that it is made a separate estate by the force of the statute, and not by the force of the instrument creating it. Thus, a conveyance of land in the ordinary form directly to the wife or to a trustee for her, creates, under the statutes, a statutory separate estate. A conveyance to a trustee for the "sole and separate use" of the wife, conferring powers or imposing restrictions upon her not conferred or imposed by the statutes, creates an equitable separate estate. The wife's title to her statutory separate estate may be either legal or equitable. Her title to her equitable separate estate is always equitable,

¹²² See, generally, 2 Pomeroy, Eq. Jur. §§ 1098-1110; Bispham, Principles of Equity, §§ 96-115; 25 Am. & Eng. Enc. Law (2d Ed.) 331; Carroll v. Lee, 3 Gill & J. (Md.) 504, 22 Am. Dec. 350; Cooney v. Woodburn, 33 Md. 320, Woodruff Cas. 148; Richardson v. De Giverville, 107 Mo. 422, 17 S. W. 974, 28 Am. St. Rep. 426; Johnson v. Vail, 14 N. J. Eq. 423, Woodruff Cas. 150; Jacques v. Methodist Episcopal Church, 17 Johns. (N. Y.) 548, Woodruff Cas. 146; Nix v. Bradley, 6 Rich. Eq. (S. C.) 43, Woodruff Cas. 139; note in 30 Am. Dec. 233.

that is, the estate is always vested in a trustee for the separate use of the wife.¹²³

How much of the wife's property, under the statute, will be separate estate, and how much left, as at common law, subject to the husband's marital right, as well as the extent of the wife's power over the property, will depend, of course, upon the terms of the particular statute. In some states the wife is now made practically a *feme sole* as to her property, all of the property owned or acquired by her being made her separate estate, the husband's marital rights being taken away. In other states her rights and powers are less extensive. The general theory and object of the statutes is not so much the creation of a power to acquire, hold, and deal with property which the wife never possessed, as a partial or complete restoration of the power which she has lost by marriage.¹²⁴ An examination of her peculiar provisions of the various statutes is not within the scope of this work.¹²⁵

The first act creating a statutory separate estate seems to have been the Mississippi act of 1839. The last of the old states to pass such an act was Virginia, its first statute having been passed in 1877.

Some question has been raised as to how the statutes removing the disabilities of married women and creating

¹²³ See ante, § 74.

¹²⁴ *Krouskop v. Shontz*, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817.

¹²⁵ For a full discussion of the wife's statutory separate estate, see 25 Am. & Eng. Enc. Law (2d Ed.) 331. Consult, also, the several state statutes and note in 99 Am. Dec. 366.

In some states the separate estate is created by provisions of the state constitution, but the principles applicable to such provisions are the same as those applicable to the statutes.

the statutory separate estate should be construed. According to some authorities, the statutes, since they are in derogation of the common law, are to be construed strictly, and must not be enlarged by construction beyond the plain meaning of the language used.¹²⁶ According to other authorities, the statutes, since they are enabling or remedial statutes, should be construed liberally so as to carry out the purpose of their enactment.¹²⁷ The true view, perhaps, is that in all cases the statutes should receive a fair interpretation, so as to carry out the intention of the legislature. The construction should not be so strict or technical as to defeat the legislative intent, nor, on the other hand, so liberal as to go beyond it.¹²⁸ It would seem that the statutes, having been passed to promote the interests of the wife, should be so construed as best to attain this object.

The statutes are to be construed as operating prospectively only, unless it plainly appears that they were intended to have a retrospective effect.¹²⁹

¹²⁶ *Brown v. Fifield*, 4 Mich. 323. See 25 Am. & Eng. Enc. Law (2d Ed.) 347. The husband's rights in the wife's property are not to be excluded by construction. *Junction R. Co. v. Harris*, 9 Ind. 184, 68 Am. Dec. 618.

¹²⁷ *Tillman v. Shackleton*, 15 Mich. 447, 93 Am. Dec. 198; *Norfolk, etc., R. Co. v. Prindle*, 82 Va. 122; *Dayton v. Walsh*, 47 Wis. 113, 2 N. W. 65, 32 Am. Rep. 757; *Krouskop v. Shontz*, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817.

¹²⁸ See *Alexander v. Alexander*, 85 Va. 353, 7 S. E. 335. It has been suggested that the construction should be both strict and liberal,—strict in ascertaining what property is to be held as separate estate, but liberal in declaring the powers of married women over such separate estate. *Burks*, Prop. Rights Mar. Women (Va.) 60. See, also, 2 *Bishop*, Mar. Women, § 17.

¹²⁹ 2 *Bishop*, Mar. Women, § 37; 25 Am. & Eng. Enc. Law (2d Ed.) 347; *Leete v. State Bank*, 115 Mo. 184, 21 S. W. 788.

The constitutionality of these statutes,¹³⁰ in so far as they apply to property acquired by or coming to the married woman after the enactment of the statutes, is unquestionable. A statute providing that property thereafter acquired by a married woman shall be her separate estate does not impair the obligation of contracts nor take away any vested rights of the husband;¹³¹ and this, although it applies to married women whose marriage took place before the enactment of the statute.¹³² But the legislature has no power, by such a statute, to deprive the husband of rights already vested when the statute was passed.¹³³ There is some conflict among the authorities as to whether certain rights are to be considered as vested. Plainly, personal property in possession at the time of the marriage, or coming to the wife at any time before the enactment of the statute, belongs absolutely to the husband, and cannot be taken away from him by the legislature.¹³⁴ There is conflict as to whether the husband takes a vested right in his wife's choses in action which he has not reduced to pos-

The statute will be given a retrospective effect when this is its plain meaning. *Rugh v. Ottenheimer*, 6 Or. 231, 25 Am. Rep. 513.

¹³⁰ See, generally, 25 Am. & Eng. Enc. Law (2d Ed.) 346; monographic note in 84 Am. St. Rep. 437.

¹³¹ *Allen v. Hanks*, 136 U. S. 300; *Jackson v. Jackson*, 144 Ill. 274, 33 N. E. 51, 36 Am. St. Rep. 427; *Winn v. Riley*, 151 Mo. 61, 52 S. W. 27, 74 Am. St. Rep. 517.

¹³² *Allen v. Hanks*, 136 U. S. 300; *Winn v. Riley*, 151 Mo. 61, 52 S. W. 27, 74 Am. St. Rep. 517; *Rugh v. Ottenheimer*, 6 Or. 213, 25 Am. Rep. 513. But see *Junction R. Co. v. Harris*, 9 Ind. 184, 68 Am. Dec. 618.

¹³³ *Erwin v. Puryear*, 50 Ark. 256, 7 S. W. 449; *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228, 58 Am. St. Rep. 170; *Rose v. Rose*, 104 Ky. 48, 46 S. W. 524, 84 Am. St. Rep. 430; *Vanata v. Johnson*, 170 Mo. 269, 70 S. W. 687.

¹³⁴ See ante, § 67; 6 Am. & Eng. Enc. Law (2d Ed.) 957.

session. The better view seems to be that he has no vested interest in such property, and that the legislature may deprive him of his mere right to reduce the chose in action into possession.¹³⁵ Some courts hold, however, that the right to reduce the chose in action into possession is itself a vested right, of which he cannot be deprived by statute.¹³⁶ Under the modern view of the nature of the estate of tenancy by the curtesy initiate,—that it is a contingent estate not vesting in the husband until the death of the wife,—it is generally held that the husband's right of curtesy initiate may be taken away by statute.¹³⁷ The same is true of the wife's inchoate right of dower.¹³⁸

The statutes creating separate estates do not abolish or affect equitable separate estates. Notwithstanding the statutes, it is still possible to create an equitable sep-

¹³⁵ Mellinger v. Bausman, 45 Pa. 522; Alexander v. Alexander, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125.

¹³⁶ Leete v. State Bank, 115 Mo. 184, 21 S. W. 788; Id., 141 Mo. 574, 42 S. W. 1074; Vanata v. Johnson, 170 Mo. 269, 70 S. W. 687; Westervelt v. Gregg, 12 N. Y. 202, 62 Am. Dec. 160. In this case it was held that the husband's right to collect a legacy to his wife was vested at the time of the testator's death, and could not be taken away by statute. In so holding, Edwards, J., said: "A right to reduce a chose in action to possession is one thing, and a right to the property which is the result of the process by which the chose in action has been reduced to possession is another and a different thing; but they are both equally vested rights."

¹³⁷ McNeer v. McNeer, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256; Rugh v. Ottenheimer, 6 Or. 231, 25 Am. Rep. 513; Alexander v. Alexander, 85 Va. 353, 7 S. E. 335. But where curtesy initiate is held to be a vested right, the legislature cannot deprive the husband of it. Jackson v. Jackson, 144 Ill. 274, 33 N. E. 51, 36 Am. St. Rep. 427; Wyatt v. Smith, 25 W. Va. 813. See, also, 8 Am. & Eng. Enc. Law (2d Ed.) 516, and note in 19 L. R. A. 256.

¹³⁸ 2 Am. & Eng. Enc. Law (2d Ed.) 957; 10 Am. & Eng. Enc. Law (2d Ed.) 145.

arate estate for the benefit of the wife by vesting property in a trustee for her use by a deed or will containing apt words to create such an estate, and defining the powers of the wife in respect to the property. In this manner the operation of statutes giving the wife entire control over her property may be avoided.¹³⁹

§ 76. Co-ownership of property.

Husband and wife may own property together as co-owners. Thus, they may take and hold personal property as joint tenants or tenants in common.¹⁴⁰ So, also, at common law as well as under the statutes, they may take real property as cotenants, if the instrument creating the estate contains apt words for the purpose.¹⁴¹

¹³⁹ 25 Am. & Eng. Enc. Law (2d Ed.) 345. See Code Va. (Pollard) § 2294; *Andes v. Roller*, 98 Va. 620, 37 S. E. 297.

Whether a separate estate is an equitable separate estate or a statutory separate estate must be determined from the language and provisions of the instrument to be construed in each case. If the instrument grants powers or imposes restrictions not granted or imposed by the statute, but which are yet consistent with the rules and principles of equity, the estate will be construed to be an equitable, and not a statutory, separate estate. *Jones v. Jones*, 96 Va. 749, 32 S. E. 463.

¹⁴⁰ *Matter of Albrecht*, 136 N. Y. 91, 32 N. E. 632, 32 Am. St. Rep. 700; *Fiedler v. Howard*, 99 Wis. 388, 75 N. W. 163, 67 Am. St. Rep. 865.

¹⁴¹ *Thornburg v. Wiggins*, 135 Ind. 178, 34 N. E. 999, 41 Am. St. Rep. 422; *Wilkins v. Young*, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162; *Robinson's Appeal*, 88 Me. 17, 33 Atl. 652, 51 Am. St. Rep. 367. Since, at common law, husband and wife are one person, it would seem that they could not hold an estate in cotenancy, which necessarily must be held by at least two persons. At the same time, it is settled at common law that, if a man and a woman not married to each other hold land as cotenants and afterwards intermarry, they hold as cotenants still; and also, as stated in the text, that an estate may be conveyed to husband and wife as cotenants, when this is the manifest intent. See 2 Cruise, Real Prop. 508-511;

To have this effect, however, at common law, the intention to create such an estate must be manifest. Ordinarily a conveyance of realty to husband and wife in such form as would create in grantees other than husband and wife an estate in cotenancy, will vest in the husband and wife a peculiar joint estate, known as a "tenancy by entireties." This is essentially a joint tenancy, as modified by the common-law doctrine that husband and wife are one person in law. Neither consort can convey any part of the estate without the concurrence of the other, nor can there be any severance or partition during their joint lives. On the death of either, the survivor holds the entire estate. Tenancies by entireties exist usually in real estate, and there is strong reason and weighty authority for the view that there can be no such estate in personal property; but it has been held in a number of cases that such an estate may exist in personal as well as in real property. Tenancies by entireties are generally held not to be affected by the statutes abolishing survivorship among joint tenants and creating separate estates; but they have been abolished in some states by other statutes.¹⁴²

1 Bishop, Mar. Women, §§ 616-618. This is an instance in which the fiction of identity of person is not rigidly applied.

¹⁴² See 19 Am. & Eng. Enc. Law (2d Ed.) 847; 1 Bishop, Mar. Women, §§ 211, 613-623; *Thornburg v. Wiggins*, 135 Ind. 178, 34 N. E. 999, 41 Am. St. Rep. 422; *Wilkins v. Young*, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162; *Robinson's Appeal*, 88 Me. 17, 33 Atl. 652, 51 Am. St. Rep. 367; *Dickey v. Converse*, 117 Mich. 449, 76 N. W. 80, 72 Am. St. Rep. 568; *Phelps v. Simons*, 159 Mass. 415, 34 N. E. 657, 38 Am. St. Rep. 430; *Johnson v. Johnson*, 173 Mo. 91, 73 S. W. 202, 96 Am. St. Rep. 486, 61 L. R. A. 166; *Den v. Hardenbergh*, 10 N. J. Law, 42, 18 Am. Dec. 371; *Hiles v. Fisher*, 144 N. Y. 306, 39 N. E. 337, 43 Am. St. Rep. 762, 30 L. R. A. 305; *McNeeley v.*

In several states a peculiar system of co-ownership of property exists,—based on the principle that each spouse should have an equal interest in the matrimonial gains. The system is said to have been borrowed from the Spanish law, and prevails in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Property so held is known as “community property,” and consists in general of all property acquired by either or both of the spouses during coverture as the product of labor or skill, or in any other manner, except by gift, bequest, devise, or descent. While the wife has an equal interest in community property with the husband, the property is generally under his sole control, and is liable for his debts. The subject of community property is regulated almost wholly by statute.¹⁴³

§ 77. Marriage settlements—Antenuptial contracts.

As originally understood, marriage settlements were ordinarily, if not always, settlements of property, made in trust in contemplation of marriage, by the prospective husband or by a third person, for the benefit of the prospective wife and the issue of the marriage. In this sense, marriage settlements have been very common in Eng-

South Penn Oil Co., 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562; notes in 18 Am. Dec. 377; 22 L. R. A. 594; and 30 L. R. A. 305.

¹⁴³ See 6 Am. & Eng. Law (2d Ed.) 293; Sprcckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 58 Am. St. Rep. 170, 36 L. R. A. 497; Cunha v. Hughes, 122 Cal. 111, 54 Pac. 535, 68 Am. St. Rep. 27; Fennell v. Drinkhouse, 131 Cal. 447, 63 Pac. 734, 82 Am. St. Rep. 361; Morse v. Estabrook, 19 Wash. 92, 52 Pac. 531, 67 Am. St. Rep. 723; notes in 86 Am. Dec. 629, 96 Am. St. Rep. 916, and 19 L. R. A. 233.

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land, but are rare in the United States; but in this country antenuptial contracts, sometimes also called "marriage settlements," are very common. These are agreements made by the husband and wife before marriage, fixing their respective rights in their own or each other's property after marriage, thus excluding the ordinary operation of the law in this respect. Such agreements are valid so far as they affect property rights, but not where they attempt to affect the personal rights, duties, and liabilities growing out of the marriage. Thus, the parties may agree that both or either may retain any or all of his or her property free from any marital claim of the other, but an agreement that the wife may select the domicile is void,¹⁴⁴ as is also an agreement that the husband shall not be liable for the wife's antenuptial debts, when such liability is imposed upon him by law.¹⁴⁵ The contract, although made before marriage, is not extinguished by the intermarriage of the parties.¹⁴⁶ The marriage is a sufficient consideration to support it. Under the statute of frauds, the contract must be in writing, and marriage is not a sufficient part performance to take it out of the operation of the stat-

¹⁴⁴ *Hair v. Hair*, 10 Rich. Eq. (S. C.) 163.

¹⁴⁵ *Coles v. Hurt*, 75 Va. 380.

Whenever a peculiar status is assigned by law to the members of any particular class of persons, affecting their general position in or with regard to the rest of the community, no one belonging to such a class can vary, by any contract, the rights and liabilities incident to this status. If he could, his private agreements would outweigh the law of the land. Coverture is such a status. *Freeman's Appeal*, 68 Conn. 533, 37 Atl. 420, 57 Am. St. Rep. 112.

¹⁴⁶ See post, § 94.

ute. No particular form of contract is required, so long as the agreement is definitely set forth.

As between the parties the agreement is valid and binding when free from fraud and undue influence, but may be set aside for either. It may be rescinded or annulled after marriage by mutual consent, but not by one party alone, unless a power of revocation is reserved. The divorce of the parties for a cause arising after marriage does not affect the contract, unless the contract expressly so provides. It seems that a decree of dissolution for a cause rendering the marriage void or voidable *ab initio* annuls the contract. The misconduct of a party after marriage does not work a forfeiture of his or her rights under the contract.

As to creditors and purchasers, the agreement is valid in the absence of fraud, and even if it is fraudulent on the part of one party, if the other party is innocent of the fraud. Thus, a conveyance by a man to his intended wife, made in consideration of marriage, but with intent to defraud his creditors, is valid after the marriage as against them, if the wife was ignorant of the fraud, unless there is a statute providing otherwise.

In some states, antenuptial contracts or settlements are required to be recorded in order to be valid as to creditors and purchasers without notice.¹⁴⁷

§ 78. Postnuptial settlements.

Postnuptial settlements are settlements of property made after marriage either by a third person upon or in

¹⁴⁷ For a full discussion of marriage settlements and antenuptial contracts, see the author's article in 19 Am. & Eng. Enc. Law (2d Ed.) 1224. See, also, Schouler, Dom. Rel. §§ 171-183.

trust for one or both of the parties, or transfers of property from one spouse to the other,—usually from the husband to the wife. They may be either voluntary, as gifts, or for a valuable consideration. The marriage, however, being a past consideration, is not a sufficient consideration. Such settlements, whether voluntary or for a valuable consideration, are valid between the parties when free from fraud or undue influence. But by reason of the husband's presumed influence over the wife, conveyances of property from the wife to the husband, or settlements unfavorable to her, are presumptively voidable, and the burden is ordinarily upon him to prove that they are fair. This is especially true in the case of gifts from the wife to the husband. Except as to the mode of transfer where husband and wife are not permitted to deal directly with each other, transfers of property between husband and wife are governed by the same general rules applicable to transfers between other persons sustaining a confidential relation to each other.

As against existing creditors of the settlor, such settlements or transfers are valid when founded upon a valuable consideration, if fairly made, although the settlor may be embarrassed or insolvent; but a voluntary settlement is voidable if made with intent to defraud, and even where there is no such intent, if the settlor is insolvent, or rendered so by the settlement. As against subsequent creditors the settlement is valid if founded upon a valuable consideration, and a voluntary settlement is presumptively valid unless made with actual fraudulent intent, or in contemplation of future indebtedness.¹⁴⁸

¹⁴⁸ See 19 Am. & Eng. Enc. Law (2d Ed.) 1224; Schouler, Dom. Rel. §§ 184-195.

It will be observed that the above rules as to the validity of postnuptial settlements as against creditors are not peculiar to the law of husband and wife. They are applicable to any case of a transfer of property by a debtor, and constitute a part of the general law of fraudulent sales and conveyances. At the same time, it is probably true that more transfers between husband and wife are or might be assailed for fraud than between any other persons. The marital relation certainly furnishes a most convenient cover for a fraud of this kind, by which a man may place his property beyond the reach of his creditors by transferring it to his wife, and still continue to enjoy it himself as before. In former times, when the intervention of a third person was necessary to make the transfer, the opportunity for fraud was very much less than under the modern statutes, enabling husband and wife to deal directly with each other; and it may well be questioned whether the principal substantial result of these much-lauded statutes has not been to enable fraudulent debtors to hold on to their property under cover of their wives' names while their creditors go unpaid. Certainly, the number of such fraudulent transfers has vastly increased since the statutes were passed. Of course, if the fraud in any case were proved against the parties, the transfer could be set aside; but it should be remembered that fraud, though always easy to charge, is often hard to prove.¹⁴⁹ In some states, however, transfers of property between husband and

¹⁴⁹ For exhaustive monographic notes on attacks by creditors on conveyances by husbands to their wives, see 90 Am. St. Rep. 497, and 56 L. R. A. 823.

wife are presumed to be voluntary and fraudulent as to creditors, and the burden of establishing their good faith and validity is upon those claiming under them.¹⁵⁰

§ 79. Rights of surviving husband or wife.

Upon the death of the wife, the husband, if surviving, has the right to act as the administrator of his wife's estate, though whether this was originally a common-law or a statutory right is disputed.¹⁵¹ The wife has a corresponding right, subject, however, to the discretion of the court.¹⁵²

The matter of administration is now everywhere regulated by statute, the surviving husband or wife being usually, if not always, preferred, in making the appointment.¹⁵³

Upon the wife's death, the surviving husband is entitled, at common law, to all of her personal property which was in possession or was reduced to possession during the coverture. His title to such property, being

¹⁵⁰ *Seitz v. Mitchell*, 94 U. S. 580; *Adone v. Spencer*, 62 N. J. Eq. 782, 49 Atl. 10, 90 Am. St. Rep. 484; *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805, 24 Am. St. Rep. 659; *Wallace v. Pereles*, 109 Wis. 316, 85 N. W. 371, 83 Am. St. Rep. 898.

The wife will not be allowed, as against the husband's creditors, to absorb his property under the cover of family support; and transfers by the husband to the wife of his means and earnings will be scrutinized closely by the courts. *Trefethen v. Lynam*, 90 Me. 376, 38 Atl. 335, 60 Am. St. Rep. 271.

¹⁵¹ 2 Kent, Comm. 135; *Schouler*, Dom. Rel. § 196; 1 Bishop, Mar. Women, § 172 et seq.; 11 Am. & Eng. Enc. Law (2d Ed.) 768; 15 Am. & Eng. Enc. Law (2d Ed.) 825.

¹⁵² 2 Kent, Comm. 411; *Schouler*, Dom. Rel. § 204; 11 Am. & Eng. Enc. Law (2d Ed.) 769.

¹⁵³ See 11 Am. & Eng. Enc. Law (2d Ed.) 720.

absolute, is not affected by the death of the wife.¹⁵⁴ If, however, she dies leaving choses in action not reduced to possession, he succeeds to them only as administrator, and not in his own right. As administrator he may sue on and recover them, but they are subject, in his hands, to the payment of her antenuptial debts. Anything left after the payment of her debts belongs to him absolutely.¹⁵⁵

Upon the death of the husband intestate and without lineal descendant, the surviving widow is entitled under the English statute of distributions (22 & 23 Car. II. c. 10) to one-half of his personal property remaining after the payment of his debts, the other half going to his next of kin. If the husband left children or their descendants, the widow's share is one-third, the other two-thirds going to the children or their representatives.¹⁵⁶

The surviving husband is entitled to no interest whatever in his deceased wife's realty, unless there was a child born alive of the marriage, in which case he is entitled to curtesy.¹⁵⁷ The surviving wife is entitled to dower in her deceased husband's realty, unless her right has been barred in some manner during marriage or by antenuptial contract.¹⁵⁸

The right of succession is now wholly regulated by statute in all the states.¹⁵⁹

¹⁵⁴ See ante, § 67.

¹⁵⁵ *Locke v. McPherson*, 163 Mo. 493, 63 S. W. 726, 85 Am. St. Rep. 546, 52 L. R. A. 420. See ante, § 67.

¹⁵⁶ See ante, § 71.

¹⁵⁷ See ante, § 70.

¹⁵⁸ See ante, § 71.

¹⁵⁹ See 27 Am. & Eng. Enc. Law (2d Ed.) 290; note in 12 Am. St. Rep. 81.

§ 80. Conflict of laws as to property rights.

The rights acquired by the marriage by husband and wife, respectively, in each other's personal property, are determined by the law of the place of their matrimonial domicile, which, in the absence of a contrary intention, is the domicile of the husband at the time of the marriage. If both parties are domiciled in the same state, and the marriage takes place therein, the law of that state, and not that of a state to which the parties may afterwards remove, will govern as to the rights acquired by the marriage.¹⁶⁰ So, also, where a woman domiciled in one state marries a man domiciled in another state, she acquires by the marriage the domicile of her husband, and it is the law of his domicile, and not that of her former domicile, that will govern.¹⁶¹ The place of the marriage is immaterial.¹⁶² The respective rights of

Although, at common law, neither husband nor wife is the heir of the other, it is otherwise in some states under the statutes. See *In re Ingram*, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80; *In re Dobbels Estate*, 104 Cal. 432, 38 Pac. 87, 43 Am. St. Rep. 123; *Lyons v. Yerex*, 100 Mich. 214, 58 N. W. 1112, 43 Am. St. Rep. 452; note in 12 Am. St. Rep. 83.

¹⁶⁰ *Doss v. Campbell*, 19 Ala. 590, 54 Am. Dec. 198; *McLean v. Hardin*, 3 Jones Eq. (N. C.) 294, 69 Am. Dec. 740.

¹⁶¹ *Parrett v. Palmer*, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479; *Townes v. Durbin*, 3 Metc. (Ky.) 352, 77 Am. Dec. 176; *Mason v. Homer*, 105 Mass. 116; *Harral v. Harral*, 39 N. J. Eq. 379, 51 Am. Rep. 17; *Kneeland v. Ensley*, Meigs (Tenn.) 620, 33 Am. Dec. 168. But see *Locke v. McPherson*, 163 Mo. 493, 63 S. W. 726, 52 L. R. A. 420. The law of the intended matrimonial domicile, though not the actual domicile at the time of the marriage, governs. *Allen v. Allen*, 6 Rob. (La.) 104, 39 Am. Dec. 453; *Routh v. Routh*, 9 Rob. (La.) 224, 41 Am. Dec. 326. See, also, *State v. Barrow*, 14 Tex. 179, 65 Am. Dec. 109.

¹⁶² *Allen v. Allen*, 6 Rob. (La.) 104, 39 Am. Dec. 553.

the parties in personalty acquired subsequent to the marriage will be determined by the law of their domicile at the time the property was acquired.¹⁶³ Rights once acquired will not be divested by a subsequent change of domicile to a place where, under the local law, they would not have been acquired;¹⁶⁴ and, conversely, where no right was acquired under the law of the domicile at the time, a subsequent change of domicile to a place where rights would have attached will not confer such rights.¹⁶⁵ In other words, rights once fixed will not be affected by any subsequent change of domicile.

The rights of the parties depend wholly upon the question of domicile, and it is immaterial where the property is situated.¹⁶⁶ This rule, however, will not be applied where it would contravene some positive rule of law or of public policy of the state in which the property is located.¹⁶⁷

The respective rights of husband and wife in each other's real property will be governed by the law of the place where the property is situated.¹⁶⁸

¹⁶³ *Birmingham Waterworks Co. v. Hume*, 121 Ala. 168, 25 So. 806, 77 Am. St. Rep. 43; *Saul v. Creditors*, 5 Mart. (N. S.; La.) 569, 16 Am. Dec. 212; *Succession of Packwood*, 9 Rob. (La.) 438, 41 Am. Dec. 341; *Noonan v. Kemp*, 34 Md. 73, 6 Am. Rep. 307; *McCollum v. Smith, Meigs* (Tenn.) 342, 33 Am. Dec. 147; *Kneeland v. Ensley, Meigs* (Tenn.) 620, 33 Am. Dec. 168; *State v. Barrow*, 14 Tex. 179, 65 Am. Dec. 109. See *Fuss v. Fuss*, 24 Wis. 256, 1 Am. Rep. 180.

¹⁶⁴ *Gluck v. Cox*, 90 Ala. 331, 8 So. 161; *Bonati v. Welsch*, 24 N. Y. 157. See *O'Neill v. Henderson*, 15 Ark. 235, 60 Am. Dec. 568.

¹⁶⁵ *Doss v. Campbell*, 19 Ala. 590, 54 Am. Dec. 198.

¹⁶⁶ *Noonan v. Kemp*, 34 Md. 73, 6 Am. Rep. 307; *McLean v. Hardin*, 3 Jones Eq. (N. C.) 294, 69 Am. Dec. 740.

¹⁶⁷ *Smith v. McAtee*, 27 Md. 420, 92 Am. Dec. 641.

¹⁶⁸ *Short v. Galway*, 83 Ky. 501, 4 Am. St. Rep. 168; *Staigg v*

III. THE DISABILITIES OF COVERTURE.

§ 81. Disabilities of the husband.

In general, marriage imposes, at common law, no disabilities whatever upon the husband except that he cannot deal directly with his wife nor testify as a witness for or against her. He may contract, sue and be sued, and acquire, hold, and, in general, dispose of, property in the same manner and to the same extent as if sole. The marriage does not affect his status, identity, or capacity before the law.

§ 82. Disabilities of the wife—In general.

At common law a woman, by marriage, loses, to a considerable extent, the legal capacity which she possessed as a *feme sole*. Her disability in some cases, as, for example, in respect to the making of contracts,^{168a} is practically complete; in other cases, as in respect to the making of wills of personalty, it is partial only. These disabilities are the result, in part, of the legal merger of the wife's existence into that of her husband, and in part of the presumed control exercised over her by him. Her disabilities in some cases, perhaps, work a hard-

Atkinson, 144 Mass. 564, 12 N. E. 354; *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 88; *McCollum v. Smith*, Meigs (Tenn.) 342, 33 Am. Dec. 147. See, also, *Richardson v. De Giverville*, 107 Mo. 422, 17 S. W. 974, 28 Am. St. Rep. 426; *Fuss v. Fuss*, 24 Wis. 256, 1 Am. Rep. 180.

See, generally, 22 Am. & Eng. Enc. Law (2d Ed.) 1354; monographic notes in 85 Am. St. Rep. 552, and 57 L. R. A. 353.

^{168a} In discussing the subject of the wife's common-law disability, Mr. Bishop says: "The conclusion of all is that, with the exception of contract and what depends upon it, the coverture alone, without the element of real or presumed coercion, takes from the wife no legal capacity." 1 Bishop, Mar. Women, § 706.

ship upon her, but in most cases they result simply in inconvenience, and, on the whole, their general effect is to protect the wife.¹⁶⁹ Moreover, "for these disabilities she is liberally compensated by the obligations which the marriage imposes upon the husband to provide for her support during the coverture, and by a claim for dower after its dissolution. She has also many exemptions from civil and criminal process, to which he alone is liable, although both may have participated in the benefit of the contract or commission of the crime, during the continuance of the matrimonial connection."¹⁷⁰

The common-law rules of disability were relaxed in certain cases of necessity, in which the reasons upon which they were based had ceased to exist,¹⁷¹ and at present most of the wife's disabilities have been abolished by statute. Except, however, where they have been removed by statutes,—which must receive a reasonable construction in the spirit of their enactment,—the disabilities of the wife remain as at common law.¹⁷²

¹⁶⁹ These personal disabilities the common law imposed partly for the protection of the husband, and partly for that of the wife. *Freeman's Appeal*, 68 Conn. 533, 37 Atl. 420, 37 L. R. A. 452.

See the often quoted passage of Blackstone in which, with his characteristic enthusiasm for the common law, he observes: "Even the disabilities which the wife lies under are for the most part intended for her protection and benefit; so great a favorite is the female sex of the laws of England." 1 Bl. Comm. 445. See Christian's note on this passage.

¹⁷⁰ *Putnam, J.*, in *Gregory v. Paul*, 15 Mass. 31.

¹⁷¹ See post, § 90.

¹⁷² *Heacock v. Heacock*, 108 Iowa, 540, 79 N. W. 353, 75 Am. St. Rep. 273; *Brown v. Brown*, 121 N. C. 8, 27 S. E. 998, 38 L. R. A. 242.

As to the construction of statutes removing the disabilities of a

The extent to which the wife's disabilities have been removed varies in the different states. The removal, especially in the older states, has been somewhat gradual, and new statutes are constantly being passed abrogating more and more of the common law. The general trend of the statutes is to give to the wife the status of a *feme sole*. In view of the local application and changing character of the legislation on this subject, the decisions under the various statutes are of little general interest.¹⁷³

§ 83. Same—Disability to contract.

At common law, since she is presumed to act under the dominion of her husband, and hence to have no independent will, a married woman, except in a few special instances, has no power to bind herself by contract. Her contracts, so far as she is concerned, are absolutely void, and cannot be enforced either during the coverture¹⁷⁴ or

married woman, see *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607; *Clow v. Chapman*, 125 Mo. 101, 28 S. W. 328, 46 Am. St. Rep. 468.

¹⁷³ For a note setting forth the statutory provisions of the various states, see 76 Am. Dec. 366; and see, generally, 2 Bishop, Mar. Women, and the sections of this work immediately following.

¹⁷⁴ 2 Kent, Comm. 150; Schouler, Dom. Rel. § 58; *Rogers v. Phillips*, 8 Ark. 366, 47 Am. Dec. 727; *Dobbin v. Dobbin*, 17 Ark. 189, 65 Am. Dec. 425; *Sweeney v. Smith*, 15 B. Mon. (Ky.) 325, 61 Am. Dec. 188; *Burton v. Marshall*, 4 Gill (Md.) 487, 45 Am. Dec. 171; *Shaw v. Thompson*, 16 Pick. (Mass.) 198, 26 Am. Dec. 655; *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 47 Am. Dec. 41; *Jackson v. Vanderheyden*, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378; *Dorrance v. Scott*, 3 Whart. (Pa.) 309, 31 Am. Dec. 509; *Caldwell v. Walters*, 18 Pa. 79, 55 Am. Dec. 592; *Harris v. Taylor*, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576; *Hollis v. Francois*, 5 Tex. 195, 51 Am. Dec. 760; *Pickens' Ex'rs v. Kniseley*, 36 W. Va. 794, 15 S. E. 997.

after its termination.¹⁷⁵ Thus, she cannot bind herself by a promissory note signed by herself alone,¹⁷⁶ or jointly with her husband.¹⁷⁷ Nor can she appoint an agent or attorney,¹⁷⁸ nor bind herself for attorney's fees for procuring a divorce.¹⁷⁹ The fact that the wife's con-

See, generally, as to the power of a married woman to contract, 15 Am. & Eng. Enc. Law (2d Ed.) 790.

It is to be noted that the married woman's disability to contract is one of the peculiar effects of the coverture, and is not the result of any personal incapacity on her part. In this respect it differs from the disability of an infant. The infant's disability grows out of his inexperience and want of discretion; the married woman's is the consequence of the paramount authority of the husband. It follows that the wife's disability is far more complete than that of an infant. Her contracts, even for necessities, are, with a few exceptions, absolutely void; those of an infant are generally voidable only, and, if for necessities, are binding. See Schouler, Dom. Rel. § 58.

But a woman may, at the same time, labor under the double disability of infancy and coverture, as where the married woman is also an infant. In such case she is not *sui juris* until both disabilities are removed,—infancy by the lapse of time, and coverture by statute or discovery. See *Stull v. Harris*, 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741; *Sandford v. McLean*, 3 Paige (N. Y.) 117, 23 Am. Dec. 773.

¹⁷⁵ Her contract cannot be enforced against the wife after the death of the husband (*Ross v. Singleton*, 1 Del. Ch. 149, 12 Am. Dec. 86), nor against the wife's administrator after her death (*Shaw v. Thompson*, 16 Pick. [Mass.] 198, 26 Am. Dec. 655).

¹⁷⁶ 4 Am. & Eng. Enc. Law (2d Ed.) 168; *Johnson v. Sutherland*, 39 Mich. 579; *Waterbury v. Andrews*, 67 Mich. 281, 34 N. W. 575; *Loomis v. Ruck*, 56 N. Y. 462.

¹⁷⁷ *Sweeney v. Smith*, 15 B. Mon. (Ky.) 325, 61 Am. Dec. 188; *Browning v. Carson*, 163 Mass. 255, 39 N. E. 1037. The husband, however, as held in this case, is liable on the note. See post, § 111.

¹⁷⁸ *Story*, Agency, § 6; 1 Am. & Eng. Enc. Law (2d Ed.) 942; *MacFarland v. Heim*, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629; *Weisbrod v. Chicago, etc., R. Co.*, 18 Wis. 35, 86 Am. Dec. 143.

¹⁷⁹ *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780. But this rule has been changed in some states by statute. *Wolcott v. Patterson*, 100 Mich. 227, 58 N. W. 1006, 43 Am. St. Rep. 456.

tract is for necessities does not render it binding, since the wife's personal incapacity, and not the nature or subject-matter of the contract, is the determining factor in the case.¹⁸⁰ The fact that the husband consents to his wife's contract, or joins in it, does not render the contract valid as to the wife.¹⁸¹ Nor can the husband bind the wife by a contract made by him in her behalf.¹⁸²

Since a married woman's contracts are absolutely void, she cannot ratify or affirm them after her disability has been removed by a dissolution of the coverture or by statute.¹⁸³ Thus, a promise by a widow or divorced woman to pay a debt contracted during coverture is without consideration, and cannot be enforced. There is, however, some conflict of authority on this point.¹⁸⁴

In equity, married women are allowed, to a greater or less extent, to make binding contracts in respect to their equitable separate estate. There is much real or apparent conflict of authority as to the extent of a married woman's power to make such contracts. By some courts it is held that a married woman has only such power to

¹⁸⁰ *Shaw v. Thompson*, 16 Pick. (Mass.) 198, 26 Am. Dec. 655; *Hayward v. Barker*, 52 Vt. 429, 36 Am. Rep. 762.

¹⁸¹ *Ross v. Singleton*, 1 Del. Ch. 149, 12 Am. Dec. 86; *Dorrance v. Scott*, 3 Whart. (Pa.) 309, 31 Am. Dec. 509; *Harris v. Taylor*, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576; *Pickens' Ex'rs v. Kuiseley*, 36 W. Va. 794, 15 S. E. 997. See note 177, *supra*.

¹⁸² *Burton v. Marshall*, 4 Gill (Md.) 487, 45 Am. Dec. 171.

¹⁸³ *Austin v. Davis*, 128 Ind. 472, 26 N. E. 890, 25 Am. St. Rep. 456, 12 L. R. A. 120; 15 Am. & Eng. Enc. Law (2d Ed.) 793.

¹⁸⁴ *Holloway's Assignee v. Rudy*, 22 Ky. L. R. 1406, 60 S. W. 650, 53 L. R. A. 353; *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 329; *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780, and note; *Hayward v. Barker*, 52 Vt. 429, 36 Am. Rep. 762. See notes in 39 Am. St. Rep. 742, and 53 L. R. A. 366; 4 Am. & Eng. Enc. Law (2d Ed.) 168.

bind her separate estate as is conferred upon her by the instrument creating the estate; but the prevailing view is that, as to such estate, she is practically a *feme sole*, and may bind it as fully as if she were unmarried, except in so far as her powers may be restricted by the instrument creating the estate.¹⁸⁵ It should be noted that a married woman's contracts respecting her equitable separate estate bind only the estate. She is not personally liable on such contracts, and no personal judgment can be rendered thereon against her.¹⁸⁶ In general, the equitable doctrine applies to statutory separate estates, except where the statutes establish a different doctrine.¹⁸⁷

The common law as to the wife's disability to contract is now to a great extent obsolete, for in many of the states statutes provide that a married woman may contract to the same extent and in the same manner as if unmarried. In other states the wife's disability has been only partially removed, and in any state a married woman may contract only to the extent and in the cases authorized by the statutes.¹⁸⁸

¹⁸⁵ 2 Kent, Comm. 164; Schouler, Dom. Rel. §§ 130-141; 1 Bishop, Mar. Women, §§ 840-879; Dobbin v. Hubbard, 17 Ark. 189, 65 Am. Dec. 425. For a full discussion of this subject, see 25 Am. & Eng. Enc. Law (2d Ed.) 388 et seq.

¹⁸⁶ 1 Bishop, Mar. Women, § 842; 2 Kent, Comm. 164; Bank v. Portee, 99 U. S. 325; Prentiss v. Paisley, 25 Fla. 927, 7 So. 56, 7 L. R. A. 640; Sweeney v. Smith, 15 B. Mon. (Ky.) 325, 61 Am. Dec. 188.

For note on judgments against a married woman at law, in equity, and under statutes, see 55 Am. Dec. 599.

¹⁸⁷ 25 Am. & Eng. Enc. Law (2d Ed.) 390; Williams v. Urmston, 35 Ohio St. 296, 35 Am. Rep. 611.

¹⁸⁸ See, generally, as to the power of a married woman to contract under the various statutes, McAnally v. Alabama Insane Hospital,

to here

In any case, before a married woman can be held liable on her contract, two things must be established: First, that she made the contract, and, second, that it was such a contract as she had power to make.¹⁸⁹

§ 84. Capacity of wife to acquire or hold property.

At common law a married woman may purchase real estate even without her husband's consent, and the conveyance is good unless he dissents thereto, as he may do; and the wife also, after his death, may disaffirm it.¹⁹⁰ So, also, a married woman may acquire property by devise.¹⁹¹ Property so acquired, whether by deed or will, may be held by her, subject, of course, to the husband's marital rights, unless these are expressly or by necessary

109 Ala. 109, 19 So. 492, 55 Am. St. Rep. 923; Watters v. Wagley, 53 Ark. 509, 14 S. W. 774, 22 Am. St. Rep. 232; Snell v. Snell, 123 Ill. 403, 14 N. E. 684, 5 Am. St. Rep. 526; Carstens v. Hanselman, 61 Mich. 426, 28 N. W. 159, 1 Am. St. Rep. 606; Speier v. Opfer, 73 Mich. 35, 40 N. W. 909, 16 Am. St. Rep. 556; Naylor v. Minbeck, 96 Mich. 182, 55 N. W. 664, 35 Am. St. Rep. 595; Porter v. Haley, 55 Miss. 66, 30 Am. Rep. 502; MacFarland v. Heim, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629; Thompson v. Taylor, 66 N. J. Law, 253, 49 Atl. 544, 54 L. R. A. 585; Armstrong v. Best, 112 N. C. 59, 17 S. E. 14, 34 Am. St. Rep. 473; First Nat. Bank v. Shaw, 109 Tenn. 237, 70 S. W. 807, 97 Am. St. Rep. 840; Carey v. Burruss, 20 W. Va. 571, 43 Am. Rep. 790; notes in 99 Am. Dec. 598, and 7 L. R. A. 640.

As to the power of a married woman to bind her separate estate by contract, particularly with reference to the creation of mechanics' liens thereon, see Rust-Owen Lumber Co. v. Holt, 60 Neb. 80, 82 N. W. 112, 83 Am. St. Rep. 512, and note.

¹⁸⁹ Brown v. Thomson, 31 S. C. 436, 10 S. E. 95, 17 Am. St. Rep. 40.

¹⁹⁰ 2 Bl. Comm. 292; 2 Kent, Comm. 150; Schouler, Dom. Rel. § 92; Harmon v. James, 7 Smedes & M. (Miss.) 111, 45 Am. Dec. 296; note 57 Am. Dec. 194.

¹⁹¹ 4 Kent, Comm. 506; Rood, Wills, § 193.

implication excluded; that is, unless the property is given to the wife as her equitable separate estate.

A wife may also acquire personal property of any kind in the usual modes, though title thereto vests at once in the husband if the property is a chose in possession, or he has a right to reduce it to possession if it is a chose in action. In the case of personalty, though she may receive, she cannot hold, the property as against her husband.¹⁹²

Under modern statutes, a married woman may, in most states, acquire and hold both real and personal property as if sole.¹⁹³

¹⁹² 1 Bishop, Mar. Women, § 699.

At common law, a married woman had capacity to take real or personal estate by grant, gift, or other conveyance, from any person except her husband; but as to real property, the husband, where no trust was created, had an estate during the coverture, and during his life, if there was issue of the marriage; and the wife's personal estate, in the absence of a trust, vested in him absolutely when reduced to his possession. *Knapp v. Smith*, 27 N. Y. 277.

¹⁹³ See, generally, as to the power of a married woman, under statutes, to acquire and hold property, *Munger v. Baldrige*, 41 Kan. 236, 21 Pac. 159, 13 Am. St. Rep. 273; *Kerr v. Urie*, 86 Md. 72, 37 Atl. 789, 63 Am. St. Rep. 493; *Blake v. Blackley*, 109 N. C. 257, 13 S. E. 786, 26 Am. St. Rep. 566.

In this connection it should be noted that, as a rule, husband and wife cannot hold property adversely to each other, the possession of the one being the possession of the other (1 Am. & Eng. Enc. Law [2d Ed.] 820; *Bell v. Bell*, 37 Ala. 536, 79 Am. Dec. 73; *Gafford v. Strauss*, 89 Ala. 283, 7 So. 248, 18 Am. St. Rep. 111; *Meacham v. Bunting*, 156 Ill. 586, 41 N. E. 175, 47 Am. St. Rep. 239; *Bader v. Dyer*, 106 Iowa, 715, 77 N. W. 469, 68 Am. St. Rep. 332); but the husband's possession of the wife's separate estate may become adverse after her death (*Lide v. Park*, 135 Ala. 131, 33 So. 175, 93 Am. St. Rep. 17).

§ 85. Conveyances by or to wife.

A husband may, by his sole deed, convey his own interest in his wife's land,¹⁹⁴ but at common law the wife had no power, either alone or jointly with her husband, to convey her own interest by deed. Her deed was absolutely void.¹⁹⁵ The only ways by which she could con-

¹⁹⁴ 2 Kent, Comm. 133; Schouler, Dom. Rel. § 90; 1 Bishop, Mar. Women, §§ 568, 586. See, also, *Martin v. Dwelly*, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245.

A conveyance of the wife's lands by the husband by his sole deed will, at common law, pass the entire beneficial interest in the land during coverture, and, if the requisites for curtesy exist, for the husband's life if he survives the wife. In other words, the husband may convey or incumber his entire interest, or it may be taken for his debts; but his conveyance cannot affect the interest of the wife or her heirs after the husband's death.

¹⁹⁵ 2 Kent, Comm. 150; 1 Bishop, Mar. Women, § 586; *Martin v. Dwelly*, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245.

In *Albany F. Ins. Co. v. Bay*, 4 N. Y. 9, the subject of conveyances by married women at common law and under colonial usages and laws was extensively discussed by Jewett, J., who, with reference to the rule of the common law, said: "By the common law, a married woman is disabled from alienating her lands by deed, either by uniting with her husband, or by executing it alone. The only mode in which she had power to transfer her title or interest in real estate was by levying a fine or suffering a common recovery, her deed being void. [Citing authorities.] The husband, as a general rule, was required to be a party with the wife in levying a fine for the conveyance of her lands. * * * The disability of a married woman to convey her lands by deed was not supposed to arise from want of reason, but, because by her marriage, she was placed under the power and protection of her husband; and it was upon that ground that the separate examination of such woman on a fine was good, because, when delivered from her husband, her judgment was supposed to be free. * * * The great object which the common law arrived at was to ascertain whether the wife, in the transfer of her estate or interest in real property, acted under fear or compulsion of her husband. In a conveyance by fine and recovery, the wife was privately examined by the court as to her voluntary con-

vey her land was by fine or common recovery.¹⁹⁶ In this country, fines and recoveries seem to have been occasionally, though rarely, resorted to,¹⁹⁷ and during the colonial period a usage existed in some of the colonies by which, in lieu of fines and recoveries, a married woman might convey her land by a deed executed jointly with her husband, such deeds being usually acknowledged.¹⁹⁸ Fines and recoveries were abolished in England by statute in 1833, and married women were empowered, with the concurrence of their husbands, to convey their lands by deeds acknowledged as prescribed by the statute.¹⁹⁹ Substantially this mode had already, as stated above, been for many years in vogue in this country, either as a matter of usage, or under colonial or later statutes. In all of the older states statutes were enacted at an early period empowering a married woman, usually in conjunction with her husband, to convey her land by a deed privately acknowledged by her.²⁰⁰ By such a conveyance the wife's title passes, but she is not bound by the covenants in the deed.²⁰¹ Under

sent, which removed the general presumption of the law that she was acting under the compulsion of her husband."

¹⁹⁶ See authorities cited in note immediately preceding. See, also, 2 Bl. Comm. 348.

¹⁹⁷ 1 Bishop, Mar. Women, § 587.

¹⁹⁸ 1 Bishop, Mar. Women, § 588; *Fowler v. Shearer*, 7 Mass. 14; *Meriam v. Harsen*, 2 Barb. Ch. (N. Y.) 232; *Davey v. Turner*, 1 Dall. (Pa.) 11; *Lloyd v. Taylor*, 1 Dall. (Pa.) 17.

¹⁹⁹ 3 & 4 Wm. IV. c. 74.

²⁰⁰ *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528. As to the acknowledgment of deeds by married women, see 1 Am. & Eng. Enc. Law (2d Ed.) 512-523. For a summary of statutory provisions, see note in 99 Am. Dec. 602.

more recent statutes a married woman may in most states convey as if sole.²⁰²

As we have already seen, a conveyance to a married woman is valid, subject to the dissent of her husband, and to her own dissent after his death.²⁰³ Under modern statutes, a married woman may take property by conveyance as if sole.

§ 86. Wills of married women.

The power to dispose of real property by will did not exist at common law, and hence could be exercised only when conferred by statute. A married woman, therefore, can dispose of real estate by will only where there is a statute giving her this power.²⁰⁴

²⁰¹ 2 Kent, Comm. 168; Schouler, Dom. Rel. § 95; 8 Am. & Eng. Enc. Law (2d Ed.) 163; *Wadleigh v. Glines*, 6 N. H. 17, 23 Am. Dec. 705; *Martin v. Dwelly*, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245. See cases cited in note 221, *infra*.

²⁰² The subject of conveyances by married women being regulated wholly by statute, no detailed treatment will be attempted here. See, generally, Brewster, Conveyancing, §§ 349-377; note in 99 Am. Dec. 602.

The power being wholly statutory, any deed or other instrument purporting to convey or encumber the land of a married woman, but not executed according to the statute, is absolutely void. *Cook v. Walling*, 117 Ind. 9, 19 N. E. 532, 10 Am. St. Rep. 17.

Under statutes, a married woman is bound by the covenants in her deed as if sole. Note in 99 Am. Dec. 608.

Under some statutes the husband is required to join with the wife in a conveyance of the wife's separate estate, the object of such a provision being to afford her his protection against imposition and fraud, and to aid her by his advice and counsel. *Rico v. Brandenstein*, 98 Cal. 465, 33 Pac. 480, 35 Am. St. Rep. 192. See *Cook v. Walling*, 117 Ind. 9, 19 N. E. 532, 10 Am. St. Rep. 17; *Peter v. Byrne*, 175 Mo. 233, 75 S. W. 443, 97 Am. St. Rep. 576; and monographic note in 97 Am. St. Rep. 584.

²⁰³ See note 190, *supra*.

²⁰⁴ 2 Kent, Comm. 170; 2 Bishop, Mar. Women, §§ 534-536; Rood,

Wills of personalty were known to the ancient common law, but it was held that a married woman could not make such a will unless her husband consented thereto. It is perhaps true that marriage does not take away her testamentary power as to personalty, but, by transferring her personal property to her husband, it necessarily renders her will inoperative. If, however, he waives his right to the property, and consents to her disposing of it by will, the will is valid and operative. It seems that no particular form of consent is necessary; it may be by parol or in writing, or implied from circumstances. It must be a consent to the particular will, and not a mere general consent that the wife may make a will. It seems that the consent, unless founded upon a valuable consideration, is revocable until the will is probated.²⁰⁵

A married woman may dispose of her equitable separate estate by will when so authorized, or unless restrained, by the instrument creating the estate.²⁰⁶ So, also, even without special statutory authority, she may make a will in execution of a power of appointment.²⁰⁷

The former law on the subject of wills of married wo-

Wills, §§ 145, 146. The right to dispose of the legal title to real estate by will did not exist in England until 1540, when it was granted by the Statute of Wills (32 Hen. VIII. c. 1). Married women were expressly excepted from the operation of this statute by the explanatory statute of 34 & 35 Hen. VIII. c. 5.

²⁰⁵ 2 Bishop, Mar. Women, §§ 537-539; Gardner, Wills, 93; Rood, Wills, § 144; Cutter v. Butler, 25 N. H. 343, 57 Am. Dec. 330, and note.

²⁰⁶ 2 Bishop, Mar. Women, § 540; Rood, Wills, § 150.

²⁰⁷ 2 Kent, Comm. 171; 2 Bishop, Mar. Women, §§ 544-546; Gardner, Wills, 95.

men is now practically obsolete, for modern statutes generally empower married women to make wills disposing of both real and personal property as if sole.²⁰⁸

At common law the marriage of a testatrix revoked her will, and in some states it is so provided by statute. There is a conflict of authority as to whether statutes giving married women full testamentary power impliedly abrogate the common-law rule as to revocation, but, on principle, it seems that they should have this effect, since they remove the reason of the rule.²⁰⁹

§ 87. Capacity of wife to act as agent or fiduciary.

At common law, a married woman may act as the agent of her husband,²¹⁰ or of a third person.²¹¹ It is not necessary for a person to be *sui juris*, or capable of

²⁰⁸ Rood, Wills, § 151; Gardner, Wills, 96. See the various state statutes.

²⁰⁹ See Rood, Wills, §§ 372-374; Gardner, Wills, 281, 285; *Roane v. Hollingshead*, 76 Md. 369, 25 Atl. 307, 35 Am. St. Rep. 438; *Kelly v. Stevenson*, 85 Minn. 247, 88 N. W. 739, 89 Am. St. Rep. 545; *In re Lyon's Will*, 96 Wis. 339, 71 N. W. 362, 65 Am. St. Rep. 52; note in 28 Am. St. Rep. 358.

At common law, marriage and the birth of a child revoked a man's will; and under some of the statutes marriage alone has this effect. Rood, Wills, §§ 375-380; Gardner, Wills, 281; *Hudnall v. Ham*, 183 Ill. 486, 56 N. E. 172, 75 Am. St. Rep. 124; and see, generally, the statutes.

²¹⁰ See post, § 99.

²¹¹ 1 Bishop, Mar. Women, § 701. It is doubtful whether, at common law, a married woman might act as agent for a third person against the will of her husband, at least where her so acting would interfere with her duties as wife. Story, Agency, § 7.

Where the common-law disabilities are removed by statute, and women are allowed to practice law, a married woman may be an attorney at law. *In re Ricker*, 66 N. H. 207, 29 Atl. 559, 24 L. R. A. 740.

acting for himself or herself, in order to be able to act as the agent of another.²¹²

A married woman may be a trustee, but her husband is personally liable for any breaches of trust she may commit, and hence she cannot act in the administration of the trust without his concurrence or consent.²¹³ So, also, she may, at common law, execute a power without the concurrence of her husband, whether the power was given to her while sole or married, and she may execute it in favor of her husband.²¹⁴

A married woman may be executrix or administratrix, but cannot act as such without her husband's consent.²¹⁵ At common law, the marriage of an executrix or administratrix does not extinguish her powers as such, but her husband acts for her in her right.²¹⁶ *to her*

§ 88. Suits by or against married women.

At common law, since a married woman has no separate legal existence, she cannot sue or be sued alone, but all suits in which she is interested, either as plaintiff or defendant, have to be brought by or against the hus-

²¹² Story, Agency, § 7.

²¹³ Hill, Trustees, 304; 28 Am. & Eng. Enc. Law (2d Ed.) 956; Trust Co. v. Sedgwick, 97 U. S. 304; Gridley v. Wynant, 23 How. (U. S.) 500.

A married woman may be a guardian. *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 47 Am. Dec. 41.

²¹⁴ 4 Kent, Comm. 324; *Stearns v. Fraleigh*, 39 Fla. 603, 23 So. 18, 39 L. R. A. 705; *Thompson v. Murray*, 2 Hill, Ch. (S. C.) 204, 48 Am. Dec. 68.

²¹⁵ 11 Am. & Eng. Enc. Law (2d Ed.) 752, 780; *Schouler, Dom. Rel.* § 86.

²¹⁶ *Schouler, Dom. Rel.* § 86; 11 Am. & Eng. Enc. Law (2d Ed.) 814; *Gates v. Whetstone*, 8 S. C. 244, 28 Am. Rep. 284.

band and wife jointly,²¹⁷ except, of course, in the case of a suit by either consort against the other.²¹⁸ In general, the rule in equity is the same as at common law.²¹⁹

Under the statutes creating statutory separate estates, the wife, in most of the states, may sue or be sued alone respecting her separate estate, and, at present, in many if not in most of the states, a married woman is permitted by statute to sue and be sued in all respects as if sole.²²⁰

§ 89. Estoppel of married women.

Since the contracts of a married woman are absolutely void at common law, they cannot, in general, operate as an estoppel against her. Thus, she is not ordinarily bound by way of estoppel by the covenants or recitals contained in her deed, although the deed is permitted to operate so far as to pass her title to the property conveyed.²²¹ She may, however, become estopped

²¹⁷ 2 Chitty, Pleadings (16th Am. Ed.) 147-149, notes.

²¹⁸ See post, § 101.

²¹⁹ 1 Bishop, Mar. Women, § 90; 10 Enc. Pl. & Pr. 223.

²²⁰ 10 Enc. Pl. & Pr. 191. See *Harvard Pub. Co. v. Benjamin*, 84 Md. 333, 35 Atl. 930, 57 Am. St. Rep. 402; and see the local statutes.

²²¹ *Curry v. American Freehold Land Mortgage Co.*, 107 Ala. 429, 18 So. 328, 54 Am. St. Rep. 105; *Cockrill v. Hutchinson*, 135 Mo. 67, 36 S. W. 375, 58 Am. St. Rep. 564; *Martin v. Dwelly*, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245; *Jackson v. Vanderheyden*, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378; *Wadkins v. Watson*, 86 Tex. 194, 24 S. W. 385, 22 L. R. A. 729. See, contra, *Nash v. Spofford*, 10 Metc. (Mass.) 192; *Hill v. West*, 8 Ohio, 222, 31 Am. Dec. 442. See notes in 43 Am. Dec. 426, and 22 L. R. A. 779.

A married woman can be divested of her title to real estate only in the mode pointed out by the statute. She is not estopped, by a void conveyance, to assert title to her realty, unless guilty of fraud. *Curry v. American Freehold Land Mortg. Co.*, 107 Ala. 429, 18 So.

by her conduct in certain cases,²²² as by her fraudulent misrepresentations or misconduct. Thus, if a married woman allows her property to stand in her husband's name, and knowingly permits him to procure credit on the faith of his ownership of the property, she will be estopped afterwards to assert her title against creditors so deceived.²²³

Under the modern statutes removing the disabilities of married women, a married woman may become estopped, so far as such disabilities are removed, in the same manner and to the same extent as any other person.²²⁴

328, 54 Am. St. Rep. 105; *Cook v. Walling*, 117 Ind. 9, 19 N. E. 532, 10 Am. St. Rep. 17; *Louisville, St. L. & T. Ry. Co. v. Stephens*, 96 Ky. 401, 29 S. W. 14, 49 Am. St. Rep. 303; *Smith v. Ingram*, 130 N. C. 100, 40 S. E. 984, 61 L. R. A. 878; *Id.*, 132 N. C. 959, 44 S. E. 643, 95 Am. St. Rep. 680; *Daniel v. Mason*, 90 Tex. 240, 38 S. W. 161, 59 Am. St. Rep. 815; *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61, 25 Am. St. Rep. 797, 3 L. R. A. 826.

²²² See, generally, *Reis v. Lawrence*, 63 Cal. 129, 49 Am. Rep. 83; *Temples v. Equitable Mortg. Co.*, 100 Ga. 503, 28 S. E. 232, 62 Am. St. Rep. 326; *Cook v. Walling*, 117 Ind. 9, 19 N. E. 532, 10 Am. St. Rep. 17; *McDanell v. Landrum*, 87 Ky. 404, 9 S. W. 223, 12 Am. St. Rep. 500; note in 58 Am. Dec. 114. A married woman is estopped from interposing her inability to contract in bar of the consequences of her own fraud. *Newman v. Moore*, 94 Ky. 147, 21 S. W. 759, 42 Am. St. Rep. 343.

²²³ *Driggs & Co.'s Bank v. Norwood*, 50 Ark. 42, 6 S. W. 323, 7 Am. St. Rep. 78; *Cravens v. Booth*, 8 Tex. 243, 58 Am. Dec. 112. See, also, *De Berry v. Wheeler*, 128 Mo. 84, 30 S. W. 338, 49 Am. St. Rep. 538.

²²⁴ See *Osborne v. Cooper*, 113 Ala. 405, 21 So. 320, 59 Am. St. Rep. 117; *Lane v. Schlemmer*, 114 Ind. 296, 15 N. E. 454, 5 Am. St. Rep. 621; *Long v. Crosson*, 119 Ind. 3, 21 N. E. 450, 4 L. R. A. 783; *Cook v. Walling*, 117 Ind. 9, 19 N. E. 532, 10 Am. St. Rep. 17, 2 L. R. A. 769; *Trimble v. State*, 145 Ind. 154, 44 N. E. 260, 57 Am. St. Rep. 163; *Dobbin v. Cordiner*, 41 Minn. 165, 42 N. W. 870, 4 L. R. A. 333; *Crenshaw v. Julian*, 26 S. C. 183, 2 S. E. 133, 4 Am. St. Rep. 719; *Brown v. Thomson*, 31 S. C. 436, 10 S. E. 95, 17 Am. St. Rep. 40; note in 83 Am. St. Rep. 520.

The subject of estoppel as it affects married women now presents, therefore, no peculiarities calling for extended discussion in the present work.²²⁵

§ 90. When wife may act as feme sole.

At common law, in certain cases, from the necessity of the case, a married woman may act as if sole. Thus, she may do so where her husband is an alien and has never been in the realm where the wife resides, or where he is civilly dead. According to some of the authorities, mere separation or desertion by the husband will not have this effect, in the absence of statutes so providing. Other courts hold, and it would seem with better reason, that where the husband repudiates his marital obligations and abandons his wife, going into another state without making provision for her support, she may contract and sue and be sued as if sole. On principle, such abandonment alone, without removal to another state, ought to be sufficient to have this effect, but the weight of authority seems to be to the contrary.²²⁶

²²⁵ For a full discussion of the law of estoppel as applied to married women, see 15 Am. & Eng. Enc. Law (2d Ed.) 795; 2 Bishop, Mar. Women, §§ 484-495; notes in 49 Am. Rep. 87, and 57 Am. St. Rep. 169.

²²⁶ See, generally, 15 Am. & Eng. Enc. Law (2d Ed.) 807; 4 Am. & Eng. Enc. Law (2d Ed.) 168; Arthur v. Broadnax, 3 Ala. 557, 37 Am. Dec. 707; Mead v. Hughes, 15 Ala. 123, 50 Am. Dec. 123; Rogers v. Phillips, 8 Ark. 366, 47 Am. Dec. 727; Love v. Moynehan, 16 Ill. 277, 63 Am. Dec. 306; Smith v. Silence, 4 Iowa, 137, 66 Am. Dec. 137; Wolf v. Bauereis, 72 Md. 481, 19 Atl. 1045, 8 L. R. A. 680; Gregory v. Paul, 15 Mass. 31; Carstens v. Hanselman, 61 Mich. 426, 28 N. W. 159, 1 Am. St. Rep. 606; Allen v. Minnesota Loan & Trust Co., 68 Minn. 8, 70 N. W. 800, 64 Am. St. Rep. 446; Starrett v. Wynn, 17 Serg. & R. (Pa.) 130, 17 Am. Dec. 654; Wright v. Hays, 10 Tex. 130,

A divorce *a vinculo matrimonii* removes all the disabilities of coverture and renders the wife once more a *feme sole*.²²⁷ The authorities are conflicting as to whether a divorce *a mensa et thoro* renders the wife competent to contract and to sue and be sued. On principle, it seems that it should have this effect, and it has been so held,²²⁸ but there is authority to the contrary.²²⁹

The effect of the insanity of the husband upon the wife's disabilities is doubtful, the authorities on the subject being in conflict. It would seem, on principle, that the wife of an insane man should be considered the head of the family, and clothed with such powers as the necessity of the case may demand.²³⁰

The questions considered in this section are now of little importance in consequence of the statutes removing the common-law disabilities of married women.

§ 91. Wife as sole trader—Partnership.

At common law, since a married woman cannot contract, she cannot engage in business on her own account.²³¹ She was permitted to do so, however, by the

60 Am. Dec. 200; Robinson v. Reynolds, 1 Aik. (Vt.) 174, 15 Am. Dec. 673; Hayward v. Barker, 52 Vt. 429, 36 Am. Rep. 762; Buford v. Adair, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. Rep. 854; notes in 37 Am. Dec. 709, 36 Am. Rep. 764, and 64 Am. St. Rep. 861.

²²⁷ Chase v. Chase, 6 Gray (Mass.) 157.

²²⁸ Dean v. Richmond, 5 Pick. (Mass.) 461; Pierce v. Burnham, 4 Metc. (Mass.) 303; 2 Kent, Comm. 157.

²²⁹ Lewis v. Lee, 3 Barn. & C. 291, 10 E. C. L. 84.

²³⁰ See, on this subject, McAnally v. Alabama Insane Hospital, 109 Ala. 109, 19 So. 492, 34 L. R. A. 223, 55 Am. St. Rep. 923; note in 34 L. R. A. 223. See, also, Shaw v. Thompson, 16 Pick. (Mass.) 198, 26 Am. Dec. 655; Robinson v. Frost, 54 Vt. 105, 41 Am. Rep. 835.

²³¹ See ante, § 83, and authorities cited in notes immediately following.

custom of London,²³² but this custom seems never to have existed in the United States²³³ except in South Carolina.²³⁴ In equity, at least with the consent of her husband, she may act as a sole trader with reference to her equitable separate estate to the extent of her power over it.²³⁵

In many if not most of the states, statutes have been passed authorizing a married woman to carry on business as a sole trader in respect to her own property, free from the control or claims of her husband or of his creditors, with substantially the same privileges, rights, and liabilities as a *feme sole*. In some states, such power is conferred upon a married woman only in special circumstances, as where she is abandoned or deserted by her husband, or is living separate and apart from him, or where, from drunkenness, profligacy, or other cause, he fails to support her.²³⁶

As a sole trader, a married woman may in some states

²³² 2 Bishop, Mar. Women, § 528. See *Beard v. Webb*, 2 Bos. & P. 93; *Petty v. Anderson*, 2 Car. & P. 38, 12 E. C. L. 17.

²³³ *Jacobs v. Featherstone*, 6 Watts & S. (Pa.) 346; *Carey v. Buruss*, 20 W. Va. 571, 43 Am. Rep. 790.

²³⁴ 15 Am. & Eng. Enc. Law (2d Ed.) 795, and cases cited.

²³⁵ *Schouler*, Dom. Rel. § 164; *Partridge v. Stocker*, 36 Vt. 108, 84 Am. Dec. 664; *Penn v. Whitehead*, 17 Grat. (Va.) 503, 94 Am. Dec. 478.

²³⁶ See *Carse v. Reticker*, 95 Iowa, 25, 63 N. W. 461, 58 Am. St. Rep. 421; *Tillman v. Shackleton*, 15 Mich. 447, 93 Am. Dec. 198; *Noel v. Kinney*, 106 N. Y. 74, 12 N. E. 351, 60 Am. Rep. 423; *Nash v. Mitchell*, 71 N. Y. 199, 27 Am. Rep. 38.

See, generally, on the power of a married woman to act as a sole trader, 15 Am. & Eng. Enc. Law (2d Ed.) 795; 25 Am. & Eng. Enc. Law (2d Ed.) 378; *Schouler*, Dom. Rel. §§ 163-170; note in 84 Am. Dec. 673.

enter into a partnership with a third person,²³⁷ though not, by the weight of authority, with her husband, unless clearly permitted by the statute.²³⁸

§ 92. Conflict of laws as to wife's disabilities.

A married woman domiciled in a certain state may make therein a contract to be performed and enforced in that state, and in such case the validity of the contract will obviously be determined by the law of that state, and no question of a conflict of laws can arise.²³⁹ But the facts are not always so simple. A woman domiciled in one state may make in that state a contract to be performed in another state; or she may make the contract in another state to be performed in the state of

²³⁷ *Deere, Wells & Co. v. Bonne*, 108 Iowa, 281, 79 N. W. 59, 75 Am. St. Rep. 254; *Vail v. Winterstein*, 94 Mich. 230, 53 N. W. 932, 34 Am. St. Rep. 334, 18 L. R. A. 515; notes in 31 Am. St. Rep. 934, and 34 Am. St. Rep. 339.

A married woman cannot form a partnership with a third person where her disability to contract has not been removed. *Carey v. Burruss*, 20 W. Va. 571, 43 Am. Rep. 790.

²³⁸ See 25 Am. & Eng. Enc. Law (2d Ed.) 379; notes in 2 L. R. A. 343, 9 L. R. A. 593, 16 L. R. A. 526, and 31 Am. St. Rep. 935. That husband and wife cannot be partners, see *Gilkerson-Sloss Commission Co. v. Salinger*, 56 Ark. 294, 19 S. W. 747, 35 Am. St. Rep. 105, 16 L. R. A. 526; *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607; *Haggett v. Hurley*, 91 Me. 442, 40 Atl. 561, 41 L. R. A. 362; *Artman v. Ferguson*, 73 Mich. 146, 40 N. W. 907, 16 Am. St. Rep. 572, 2 L. R. A. 343; *Board of Trade v. Hayden*, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 31 Am. St. Rep. 919, 16 L. R. A. 530; *Fuller v. McHenry*, 83 Wis. 573, 53 N. W. 896, 18 L. R. A. 512. That they may be partners, see *Burney v. Savannah Grocery Co.*, 98 Ga. 711, 25 S. E. 915, 58 Am. St. Rep. 342; *Hoaglin v. Henderson*, 119 Iowa, 720, 94 N. W. 247, 61 L. R. A. 756; *Suau v. Caffé*, 122 N. Y. 308, 25 N. E. 488, 9 L. R. A. 593.

²³⁹ See *Freeman's Appeal*, 68 Conn. 533, 37 Atl. 420, 37 L. R. A. 452; *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251.

her domicile, or in a third state. Again, the enforcement of the contract may be sought, that is, suit may be brought upon it, in a different state from that of the domicile, or from that in which the contract was made or was to be performed. If, then, the laws of these several states as to the power of a married woman to contract be different, she being empowered to contract in one state, but not in another, it becomes a very important matter to determine by what law her contract is to be governed. There is some conflict among the authorities,²⁴⁰ but the general rule is pretty well settled that the validity of the contract is to be determined by the law of the state in which it was made, and, if valid there, it will be enforced everywhere, although not valid by the law of the domicile, or of the place of performance, or of the forum; and, conversely, if void where made, it is void everywhere.²⁴¹ Thus, the contract will be enforced if valid where made, although not valid by the law of the forum, provided its enforcement would not contravene some rule of public policy of the forum state.²⁴²

²⁴⁰ For exhaustive monographic notes on the subject, see 57 L. R. A. 513, and 85 Am. St. Rep. 552. See, also, note in 46 Am. St. Rep. 448.

²⁴¹ *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *State Bank v. Maxson*, 123 Mich. 250, 82 N. W. 31, 81 Am. St. Rep. 196; *Thompson v. Taylor*, 66 N. J. Law, 253, 49 Atl. 544, 54 L. R. A. 585, 88 Am. St. Rep. 485; *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 62 N. E. 672, 88 Am. St. Rep. 614, 57 L. R. A. 513.

In *Brown v. Dalton*, 105 Ky. 669, 49 S. W. 443, 88 Am. St. Rep. 325, it was held that a contract between a husband and wife, made in Kentucky, in which state they were domiciled, by which he conveyed to her land lying in Virginia, and she assumed a debt of his there payable, would not be enforced in Kentucky, by the law of which such a contract was void, though valid in Virginia.

²⁴² *Baer Brothers v. Terry*, 108 La. 597, 32 So. 353, 92 Am. St. Rep.

Where the married woman's domicile is in some other state than that of the forum, there will ordinarily be no such rule of policy; but where the state of the forum is also the state of domicile, and the contract sued on is void according to a settled policy of that state, adopted for the protection of its citizens, it will not be enforced there, though valid where made.²⁴³ But where there is no such rule of policy, the contract will be enforced, although both forum and domicile are in the same state, by the law of which the contract is void.²⁴⁴

Matters relating to the remedy, as distinguished from the validity of the contract, such as the form of action, the mode of procedure, the statute of limitations, etc., are to be determined by the law of the forum.²⁴⁵

394; *State Bank v. Maxson*, 123 Mich. 250, 32 N. W. 31, 81 Am. St. Rep. 196; *Wright v. Remington*, 41 N. J. Law, 51, 32 Am. Rep. 180; *Thompson v. Taylor*, 66 N. J. Law, 253, 49 Atl. 544, 54 L. R. A. 585, 88 Am. St. Rep. 485; *Robinson v. Queen*, 87 Tenn. 445, 11 S. W. 38, 10 Am. St. Rep. 690, 3 L. R. A. 214.

²⁴³ *Bank of Louisiana v. Williams*, 46 Miss. 618, 12 Am. Rep. 319; *Armstrong v. Best*, 112 N. C. 59, 17 S. E. 14, 34 Am. St. Rep. 473; *First Nat. Bank v. Shaw*, 109 Tenn. 237, 70 S. W. 807, 59 L. R. A. 498, 97 Am. St. Rep. 840. See *Minor*, *Conf. Laws*, § 72. In this section the author makes a distinction between the policy of those states in which the wife's disability is total or general, and those in which it is partial only. In the former class of states the contract made in another state will not be enforced in the domicile state, while in the latter class it will be so enforced. The cases cited in this note and the note immediately following illustrate this principle.

²⁴⁴ *Millikin v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Thompson v. Taylor*, 66 N. J. Law, 253, 49 Atl. 544, 54 L. R. A. 585, 88 Am. St. Rep. 485, reversing 65 N. J. Law, 107, 46 Atl. 567.

²⁴⁵ *Ruhe v. Buck*, 124 Mo. 178, 27 S. W. 412, 46 Am. St. Rep. 439, 25 L. R. A. 178; *Evans v. Cleary*, 125 Pa. 204, 17 Atl. 440, 11 Am. St. Rep. 886; note in 46 Am. St. Rep. 452.

In some cases it has been held that the law of the place where the contract is to be performed will govern.²⁴⁶

Contracts affecting the title to real property, such as conveyances and the like, will be governed by the law of the state in which the land lies.²⁴⁷

§ 93. Mutual disqualification as witnesses.

At common law, husband and wife are incompetent as witnesses for or against each other. Neither can testify in a suit in which the other is interested. The principal reasons for this disability are (1) the legal unity

²⁴⁶ *Baum v. Birchall*, 150 Pa. 164, 24 Atl. 620, 30 Am. St. Rep. 797. See, also, *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251. In *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 62 N. E. 672, 88 Am. St. Rep. 614, 57 L. R. A. 513, the general principles as to the conflict of laws in matters of contract were summed up as follows: (1) All matters bearing upon the execution, the interpretation, and the validity of contracts, including the capacity of the parties to contract, are determined by the law of the place where the contract is made. (2) All matters connected with its performance, including presentation, notice, demand, etc., are regulated by the law of the place where the contract, by its terms, is to be performed. (3) All matters respecting the remedy to be pursued, including the bringing of suits and the service of process, depend upon the law of the place where the action is brought.

²⁴⁷ *Walling v. Christian & C. Grocery Co.*, 41 Fla. 479, 27 So. 46, 47 L. R. A. 608; *Rush v. Landers*, 107 La. 549, 32 So. 95, 57 L. R. A. 353; *Smith v. Ingram*, 130 N. C. 100, 40 S. E. 984, 61 L. R. A. 878; *Id.*, 132 N. C. 959, 44 S. E. 643, 95 Am. St. Rep. 680; *Baum v. Birchall*, 150 Pa. 164, 24 Atl. 620, 30 Am. St. Rep. 797.

But contracts (not conveyances) relating to realty may be governed by the *lex loci contractus*. *Polson v. Stewart*, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. Rep. 452. So, also, real property situated in one state may be taken for a debt of a married woman contracted in another state, if, by the law of the state where the contract was made, though not by that of the state in which the land lies, real property may be so taken. See *State Bank v. Maxson*, 123 Mich. 250, 82 N. W. 31, 81 Am. St. Rep. 196.

of husband and wife, in consequence of which the testimony of either would be for or against himself or herself, in violation of the common-law rule that no one is allowed to testify in his own cause, nor required to testify in incrimination of himself; and (2) the rule of public policy which prohibits the disclosure of matters learned in matrimonial confidence.²⁴⁸

The general rule applies in criminal as well as in civil cases. Upon the trial of either husband or wife on a criminal charge, the other spouse is not a competent witness to prove the offense charged.²⁴⁹

The termination of the coverture by death or divorce does not remove the disability to testify either as to matters learned in matrimonial confidence,²⁵⁰ or, it is generally held, as to any matters occurring during coverture.²⁵¹

The general rule was subject to some exceptions and limitations, even at common law. The most conspicuous exception was that in a criminal prosecution of either spouse for an offense committed upon the person of the other, the latter is a competent witness against the accused. In this case the policy of the law upon which

²⁴⁸ Schouler, Dom. Rel. § 53; 1 Greenl. Ev. (Wigmore's Ed.) § 333c et seq.; Com. v. Sapp, 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405, Woodruff, Cas. 203; De Farges v. Ryland, 87 Va. 404, 12 S. E. 805, 24 Am. St. Rep. 659; notes in 24 Am. St. Rep. 663, and 29 Am. St. Rep. 411.

²⁴⁹ 1 Greenl. Ev. (Wigmore's Ed.) § 334.

²⁵⁰ 1 Greenl. Ev. (Wigmore's Ed.) § 337.

²⁵¹ Rea v. Tucker, 51 Ill. 110, 99 Am. Dec. 539; Hanselman v. Dovel, 102 Mich. 505, 60 N. W. 978, 47 Am. St. Rep. 557; State v. Kodat, 158 Mo. 125, 59 S. W. 73, 81 Am. St. Rep. 292; Chamberlain v. People, 23 N. Y. 85, 80 Am. Dec. 255.

the general rule is founded is overcome by the superior policy, which demands the punishment of crime which, but for this exception, might go unpunished.²⁵²

Modern statutes have greatly changed the common-law rules as to the competency of husband and wife as witnesses. These changes have been the result, for the most part, of the dropping of the legal fiction of the unity of husband and wife, and the abrogation of the general rule of the common law disqualifying a witness because of interest. The statutes vary considerably in terms and in the extent to which the disqualification is removed. The general tendency of the statutes is towards the removal of the disqualification in all cases in which it depended upon the supposed identity of person of husband and wife, and their consequent interest in the suit. The rule prohibiting the disclosure of matters learned in matrimonial confidence still remains in force, the statutes being, on this point, simply declaratory of the common law.²⁵³

²⁵² Greenl. Ev. (Wigmore's Ed.) § 343; *Com. v. Sapp*, 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405, Woodruff, Cas. 203.

²⁵³ See, generally, *People v. Curiale*, 137 Cal. 534, 70 Pac. 468, 59 L. R. A. 589; *Merriam v. Hartford, etc., R. Co.*, 20 Conn. 354, 52 Am. Dec. 344; *Walker v. State*, 34 Fla. 167, 16 So. 80, 43 Am. St. Rep. 186; *Mercer v. State*, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135; *Com. v. Sapp*, 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405, Woodruff, Cas. 203; *Fuller v. Fuller*, 177 Mass. 184, 58 N. E. 588, 83 Am. St. Rep. 273; *Reynolds v. Schaeffer*, 91 Mich. 494, 52 N. W. 15, 30 Am. St. Rep. 492; *People v. Schoonmaker*, 117 Mich. 190, 75 N. W. 439, 72 Am. St. Rep. 560; *State v. Frey*, 76 Minn. 526, 79 N. W. 518, 77 Am. St. Rep. 660; *Cramer v. Hurt*, 154 Mo. 112, 55 S. W. 258, 72 Am. St. Rep. 752; *State v. Kodat*, 158 Mo. 125, 59 S. W. 73, 81 Am. St. Rep. 292; *Robinson v. Robinson*, 22 R. I. 121, 46 Atl. 455, 84 Am. St. Rep. 832; *State v. Burt* (S. D.) 94 N. W. 409, 62 L. R. A. 172; *Roland v. State*, 9 Tex. App. 277, 35 Am. Rep. 743; *Brock v. State* (Tex.

IV. TRANSACTIONS BETWEEN HUSBAND AND WIFE.

§ 94. Antenuptial contracts—Effect of marriage.

An unmarried woman is as competent, at common law, to make a contract, as an unmarried man, and, so far as competency of parties is concerned, a contract between an unmarried woman and an unmarried man is, of course, valid. It is pertinent to inquire what is the effect of the intermarriage of the parties to such a contract. The general rule is that, since a man and a woman, by intermarriage, become one person in law, all executory contracts between them entered into before marriage are discharged at common law.²⁵⁴ Thus, a debt due from either to the other is extinguished by the marriage,²⁵⁵ and is not revived by the termination of the coverture by divorce,²⁵⁶ or the death of one of the parties.²⁵⁷

To the general rule there are several exceptions, namely: (1) Contracts to be performed after the coverture is determined, as where a man, before marriage, binds his executors to pay money to his wife after his death.²⁵⁸

Cr. App.) 71 S. W. 20, 60 L. R. A. 465; *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622.

A full discussion of this topic will be found in works on evidence.

²⁵⁴ See 15 Am. & Eng. Enc. Law (2d Ed.) 852; note in 73 Am. St. Rep. 898. The rule in equity is the same as at law, except as to marriage settlements. *Schilling v. Darmody*, 102 Tenn. 439, 52 S. W. 291, 73 Am. St. Rep. 892.

²⁵⁵ *Butler v. Butler*, 14 Q. B. Div. 831; *Farley v. Farley*, 91 Ky. 497, 16 S. W. 129; *Abbott v. Winchester*, 105 Mass. 115; *Burleigh v. Coffin*, 22 N. H. 118, 53 Am. Dec. 236.

²⁵⁶ *Farley v. Farley*, 91 Ky. 497, 16 S. W. 129, *Woodruff*, Cas. 84.

²⁵⁷ *Abbott v. Winchester*, 105 Mass. 115; *Burleigh v. Coffin*, 22 N. H. 118, 53 Am. Dec. 236.

²⁵⁸ *Milbourn v. Ewart*, 5 Term R. 375; *Cage v. Acton*, 12 Mod. 288.

(2) Contracts made in contemplation and in consideration of marriage, usually known as marriage settlements or antenuptial contracts.²⁵⁹ (3) Contracts made by one or both of the parties in a representative capacity, as executor, administrator, etc. Thus, if a man executes a bond payable to an administratrix, and afterwards marries the administratrix, the bond nevertheless remains in force.²⁶⁰ (4) Contracts made by one party with a trustee for the other.²⁶¹ The excepted contracts are not extinguished by the marriage.

It would seem that under statutes giving a married woman full contractual capacity and the right to retain her own property and her separate earnings, and exonerating the husband from liability for her antenuptial debts, the common-law rule that debts between husband and wife are extinguished should cease, along with the reasons for it, and it has been so held under the married women's acts.²⁶² But it has also been held that wherever any of the substantial reasons for the rule remain in force, as under statutes not completely "emancipating" the wife, the common-law rule still obtains.²⁶³

²⁵⁹ *Bispham*, Princ. Eq. § 114. See ante, § 77.

²⁶⁰ *King v. Green*, 2 Stew. (Ala.) 133, 19 Am. Dec. 46.

²⁶¹ 1 Minor, Inst. (2d Ed.) 291. A conspicuous instance is the case of marriage settlements.

²⁶² *Wilson v. Wilson*, 36 Cal. 447, 95 Am. Dec. 194; *Power v. Lester*, 23 N. Y. 527. See, also, *In re Callister*, 153 N. Y. 294, 47 N. E. 268, 60 Am. St. Rep. 620. In Maine it has been held, under a statute providing that "a woman, having property, is not deprived of any part of it by her marriage," that a divorced woman may recover from her former husband for personal services performed for him before their marriage. *Carlton v. Carlton*, 72 Me. 115, 39 Am. Rep. 307.

²⁶³ *Butler v. Butler*, 14 Q. B. Div. 831; *Farley v. Farley*, 91 Ky.

§ 95. Postnuptial contracts and transfers of property—At common law.

In consequence of the legal unity of husband and wife, all direct dealings between them are, in general, mere nullities at common law. Thus, they cannot contract with each other. This would necessarily follow from the fact that at common law a married woman has no power to contract at all; and, furthermore, since the legal identity of the wife is merged into that of her husband, such a contract would, in effect, be the contract of a man with himself, which is an absurdity; and, moreover, since the wife is presumed to be under the coercion of the husband, she would not be bound by the contract, because she is supposed not to have entered into it of her own free will. Such contracts, therefore, are void at common law.²⁶⁴

497, 16 S. W. 129; *Schilling v. Darmody*, 102 Tenn. 439, 52 S. W. 291, 73 Am. St. Rep. 892. Where the husband still has the right to his wife's services, an antenuptial promise by him to pay her for her services is extinguished by the marriage. *In re Callister*, 153 N. Y. 294, 47 N. E. 268, 60 Am. St. Rep. 620.

²⁶⁴ 1 Bl. Comm. 442; *Schouler*, Dom. Rel. § 52; *Crater v. Crater*, 118 Ind. 521, 21 N. E. 290, 10 Am. St. Rep. 161; *Brown v. Dalton*, 105 Ky. 668, 49 S. W. 443, 88 Am. St. Rep. 325; *Helms v. Franciscus*, 2 Bland (Md.) 544, 20 Am. Dec. 402; *Beach v. Beach*, 2 Hill (N. Y.) 260, 38 Am. Dec. 584; *Hendricks v. Isaacs*, 117 N. Y. 411, 22 N. E. 1029, 15 Am. St. Rep. 524.

A divorced wife cannot sue her former husband at law upon an implied contract arising during coverture, such contract being void. *Pittman v. Pittman*, 4 Or. 298.

As a practical question it is immaterial whether the rule that husband and wife cannot contract directly with each other be considered as resulting from the legal identity of the parties or from the presumed coercion of the wife by the husband, or from a combination of both reasons. It would seem, however, that the technical difficulty growing out of the legal identity of the parties is the stronger

For the same reasons, conveyances of property, which are but executed contracts, made by either spouse directly to the other, are void. The husband cannot convey to the wife,²⁶⁵ nor can the wife, even though her general disability to make a conveyance has been removed, convey directly to the husband.²⁶⁶ But a conveyance between husband and wife may be made indirectly through a third person as an intermediary. Thus, the husband may convey his land to a third person for reconveyance by the latter to the wife, and, when the intermediary so conveys, the title vests in the wife.²⁶⁷ So, also, the wife may convey her land to a third person, who may in turn convey it to the husband.²⁶⁸ In this case, where the law requires the deed of a married woman to be executed by her jointly with her husband, the husband must join in the wife's conveyance to the

reason; but in examining the question, the court, in *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528, declared the presumed coercion to be the true reason of the rule. In *Barnett v. Harshbarger*, 105 Ind. 410, it is said that "the rule of the common law proceeds upon the theory that, in legal contemplation, the husband and wife are one person, and not upon the theory that the wife is under a legal disability."

²⁶⁵ 2 Kent, Comm. 129; *Manning v. Pippen*, 86 Ala. 357, 5 So. 572, 11 Am. St. Rep. 46; *Fowler v. Trebein*, 16 Ohio St. 493, 91 Am. Dec. 95.

²⁶⁶ *Rico v. Brandenstein*, 98 Cal. 465, 33 Pac. 480, 35 Am. St. Rep. 192, 20 L. R. A. 702; *White v. Wager*, 25 N. Y. 328. But see *Burdeno v. Amperse*, 14 Mich. 91, 90 Am. Dec. 225.

²⁶⁷ *Bartholomew v. Muzzy*, 61 Conn. 387, 23 Atl. 604, 29 Am. St. Rep. 206; *Motte v. Alger*, 15 Gray (Mass.) 322; *Donahue v. Hubbard*, 154 Mass. 537, 28 N. E. 909, 26 Am. St. Rep. 271.

²⁶⁸ *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528; *Jackson v. Stevens*, 16 Johns. (N. Y.) 110; *Meriam v. Harsen*, 2 Barb. Ch. (N. Y.) 232; *Shepperson v. Shepperson*, 2 Grat. (Va.) 501.

intermediary;²⁶⁹ but such joinder is not necessary where a wife may convey her property by her sole deed.²⁷⁰ In this connection it should be noted that a statute removing the disability of a wife to convey, and enabling her to convey real and personal property as if she were unmarried, does not remove the disability of the husband to take by conveyance from his wife, and notwithstanding such a statute, a conveyance by a wife directly to her husband is void.²⁷¹

The foregoing considerations apply with equal force to voluntary transfers or gifts. These are generally void at common law.²⁷²

§ 96. Same—Doctrine in equity.

Courts of equity, to a considerable extent, disregard the legal fiction of the unity of husband and wife, and, in a proper case, will uphold and enforce direct dealings between them. Thus, a contract between husband and wife, though void at law, may be sustained in equity if just and fair.²⁷³ As was said by the court in a recent

²⁶⁹ See cases cited in note immediately preceding.

²⁷⁰ See ante, § 84.

²⁷¹ *Rico v. Brandenstein*, 98 Cal. 465, 33 Pac. 480, 35 Am. St. Rep. 192; *White v. Wager*, 25 N. Y. 328, Woodruff, Cas. 132.

²⁷² 14 Am. & Eng. Enc. Law (2d Ed.) 1032; *Brown v. Brown*, 174 Mass. 197, 54 N. E. 532, 75 Am. St. Rep. 292.

A gift of money by a husband to his wife is void at law, and as inoperative as a gift to himself. *Washburn v. Hale*, 10 Pick. (Mass.) 429.

But a gift may be made by husband to wife through a third person. *Brown v. Brown*, 174 Mass. 197, 54 N. E. 532, 75 Am. St. Rep. 292.

²⁷³ *Wallingsford v. Allen*, 10 Pet. (U. S.) 583; *Haussman v. Burnham*, 59 Conn. 117, 22 Atl. 1065, 21 Am. St. Rep. 74; *Veal's Adm'r v.*

case:²⁷⁴ "The doctrine of the unity of husband and wife, by which the legal existence of the wife was deemed to be merged in that of her husband, preventing them from contracting with each other as if they were two distinct persons, never prevailed in courts of equity. It may be more accurate to say that courts of equity disregard the fiction upon which the common law proceeded, and are accustomed to lay hold of and give effect to transactions or agreements between husband and wife, according to the nature and equity of the case. A court of equity does not limit its inquiry to the ascertainment of the fact whether what had taken place would, as between other persons, have constituted a contract, and give relief, as a matter of course, if a formal contract be established, but it further inquires whether the contract was just and fair, and equitably ought to be enforced, and administers relief where both the contract and the circumstances require it."

Upon the same principles, conveyances between husband and wife will be upheld in equity, conveyances being merely executed contracts.²⁷⁵ So, also, gifts, if fully

Veal, 89 Ky. 314, 12 S. W. 384, 25 Am. St. Rep. 534; *Bowie v. Stonestreet*, 6 Md. 418, 61 Am. Dec. 318.

"Contracts between husband and wife will sometimes be enforced in equity. But courts of chancery do not recognize the same right in husband and wife to contract with each other that they would have at common law were they single. Such contracts will be examined with great caution, and will only be enforced when made in good faith, upon a valuable consideration, and when they are just, reasonable, and certain in their terms." *Bispham*, *Princ. Eq.* § 114.

²⁷⁴ *Per Andrews, J.*, in *Hendricks v. Isaacs*, 117 N. Y. 411, 22 N. E. 1029, 15 Am. St. Rep. 524.

²⁷⁵ *Jones v. Clifton*, 101 U. S. 225; *Moore v. Page*, 111 U. S. 117, *Woodruff*, *Cas.* 130; *Sims v. Ricketts*, 35 Ind. 181, 9 Am. Rep. 679,

executed, will be sustained.²⁷⁶ "Courts of equity do not entertain jurisdiction to enforce mere voluntary agreements not founded upon any consideration, either in favor of the wife against the husband, or in his favor against the wife; but if they have been consummated, and are fair and just, courts of equity will uphold the transaction, except as against creditors."²⁷⁷

Wherever a court of equity sanctions dealings between husband and wife, they may deal with each other directly. No third person as intermediary is necessary.²⁷⁸

Since the relation existing between husband and wife is of a most intimate and confidential character, affording the greatest opportunity for the exercise of undue influence, especially on the part of the husband, courts of equity will closely scrutinize transactions between

Woodruff, Cas. 133; *Wilder v. Brooks*, 10 Minn. 50, 88 Am. Dec. 49; *Turner v. Shaw*, 96 Mo. 22, 8 S. W. 897, 9 Am. St. Rep. 319; *Shepard v. Shepard*, 7 Johns. Ch. (N. Y.) 57, 11 Am. Dec. 396; *Hunt v. Johnson*, 44 N. Y. 27, 4 Am. Rep. 631; *Sayers v. Wall*, 26 Grat. (Va.) 354, 21 Am. Rep. 303. A conveyance by a husband directly to the wife, though void at common law, passes an equitable title, the husband retaining the legal title as trustee for the wife. *Ogden v. Ogden*, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151.

²⁷⁶ 14 Am. & Eng. Enc. Law (2d Ed.) 1032-1034, and cases there cited; *Bispham*, Princ. Eq. § 114; *Botts v. Gooch*, 97 Mo. 88, 11 S. W. 45, 10 Am. St. Rep. 287.

In some cases it has been held that voluntary conveyances from husband to wife are void in equity as well as at law. *Dean v. Metropolitan El. R. Co.*, 119 N. Y. 540, 23 N. E. 1054; *Fowler v. Trebein*, 16 Ohio St. 493, 91 Am. Dec. 95. This can be correct, however, only in exceptional cases. It is well settled that gifts by husband to wife, whether of realty or chattels, are valid in equity if free from fraud.

²⁷⁷ *Per Andrews, J.*, in *Hendricks v. Isaacs*, 117 N. Y. 411, 22 N. E. 1029, 15 Am. St. Rep. 524.

²⁷⁸ *Wallingsford v. Allen*, 10 Pet. (U. S.) 583; *Jones v. Clifton*, 101 U. S. 225.

them which operate to the advantage of the stronger party, and will require clear proof of its fairness and good faith.²⁷⁹ In general, the wife has a right to rely upon the promises and representations of her husband, and is not precluded from obtaining relief against his fraud by her failure to make investigations for herself.²⁸⁰

§ 97. Same—Under statutes.

The common-law rules as to dealings between husband and wife have in many if not most of the states been abrogated or greatly modified by statute. The general trend of the statutes has been to place husband and wife, in this respect, upon substantially the same footing as strangers, the common-law fiction of their legal unity being dropped, and substantially the doctrine of courts of equity adopted. Under statutes so providing, husband and wife may contract directly with each other or convey property to each other, in most cases as if the marital relation did not exist between them.²⁸¹ It

²⁷⁹ 29 Am. & Eng. Enc. Law (2d Ed.) 129; *Meldrum v. Meldrum*, 15 Colo. 478, 24 Pac. 1083, 11 L. R. A. 65; *De Ruiter v. De Ruiter*, 29 Ind. App. 9, 62 N. E. 100, 91 Am. St. Rep. 106; *Farmer v. Farmer*, 39 N. J. Eq. 215; *Boyd v. De La Montagnie*, 78 N. Y. 498, 29 Am. Rep. 197; *Darlington's Appeal*, 86 Pa. 512, 27 Am. Rep. 726.

²⁸⁰ *De Ruiter v. De Ruiter*, 29 Ind. App. 9, 62 N. E. 100, 91 Am. St. Rep. 106.

²⁸¹ *Osborne v. Cooper*, 113 Ala. 405, 21 So. 320, 59 Am. St. Rep. 117; *Jones v. Chenault*, 124 Ala. 610, 27 So. 515, 82 Am. St. Rep. 211; *Dimond v. Sanderson*, 103 Cal. 97, 37 Pac. 189; *Glas v. Glas*, 114 Cal. 566, 46 Pac. 667, 55 Am. St. Rep. 90; *O'Connell v. Taney*, 16 Colo. 353, 27 Pac. 888, 25 Am. St. Rep. 275; *Corr's Appeal*, 62 Conn. 409, 26 Atl. 478; *Barrows v. Barrows*, 138 Ill. 649, 28 N. E. 983; *Despain v. Wagner*, 163 Ill. 598, 45 N. E. 129; *Peaks v. Hutchinson*, 96 Me. 530, 53 Atl. 38, 59 L. R. A. 279; *Johnson v. Johnson*, 173 Mo. 91, 73 S. W. 202, 96 Am. St. Rep. 486; *Williams v. Harris*, 4 S. D. 22, 54 N. W.

should be noted, however, that this great change in the law is not accomplished except where the legislature clearly so intends. A statute giving married women power to make contracts generally as if sole does not enable a wife to enter into a binding contract with her husband.²⁸² Moreover, even where husband and wife are empowered to contract with each other, their power to do so is sometimes subject to restrictions and exceptions. Thus, the statute may authorize married women to contract with their husbands only in matters relating to their separate estate;²⁸³ or it may be provided that transactions between husband and wife shall be governed by the general rules applicable to dealings between persons occupying confidential relations with each other,²⁸⁴ which would undoubtedly be the case even in the absence of such a provision.²⁸⁵ So, also, irrespective of the

926, 46 Am. St. Rep. 753; *Story v. Marshall*, 24 Tex. 305, 76 Am. Dec. 106.

See, generally, as to the validity of contracts and conveyances between husband and wife, at common law, in equity, and under the statutes, notes in 57 Am. Dec. 195, 88 Am. Dec. 54, 99 Am. Dec. 599, and 9 Am. St. Rep. 323.

²⁸² *Heacock v. Heacock*, 108 Iowa, 540, 79 N. W. 353, 75 Am. St. Rep. 273; *Kneil v. Egleston*, 140 Mass. 202, 4 N. E. 573; *Hendricks v. Isaacs*, 117 N. Y. 411, 22 N. E. 1029, 15 Am. St. Rep. 524, 6 L. R. A. 559. See, also, *Plaisted v. Hair*, 150 Mass. 275, 22 N. E. 921, 5 L. R. A. 664.

²⁸³ *Heacock v. Heacock*, 108 Iowa, 540, 79 N. W. 353, 75 Am. St. Rep. 273.

²⁸⁴ See *Brison v. Brison*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; *Dimond v. Sanderson*, 103 Cal. 97, 37 Pac. 1890.

A gift from husband to wife may be revoked or set aside if procured by fraud. *Meldrum v. Meldrum*, 15 Colo. 478, 24 Pac. 1083, 11 L. R. A. 65; *Evans v. Evans*, 118 Ga. 890, 45 S. E. 612, 98 Am. St. Rep. 180.

²⁸⁵ See ante, § 96.

terms of the statute, certain contracts between husband and wife may be void either because of the relationship of the parties or the nature of the contract. Thus, in some states a married woman cannot enter into a contract of partnership with her husband, unless the statute expressly so provides, although her common-law disabilities have been so far removed that she may become a partner of a stranger. This appears to be the better doctrine, though it is held otherwise in other states, the apparent conflict being probably mostly due to differences in the statutes.²⁸⁶ Again, agreements by either or both of the parties to perform the obligations to each other growing out of the marital relation are without consideration, contrary to public policy, and void.²⁸⁷

Since the marriage relation affords a convenient cover for the commission of fraud upon third persons by transfers of property from husband to wife, transactions between them to the prejudice of the husband's creditors will be closely scrutinized by the courts, to see that they are fair and honest, and not mere contrivances for placing the husband's property beyond the reach of his creditors.^{287a}

§ 98. Relation of debtor and creditor between husband and wife.

A wife may make a valid loan to her husband, and if

²⁸⁶ See ante, § 91.

²⁸⁷ See ante, §§ 59, 65. And see *Dempster Mill Mfg. Co. v. Bundy*, 64 Kan. 444, 67 Pac. 816, 56 L. R. A. 739, in which the leading cases are stated. A contract by a wife to support her husband is void. *Corcoran v. Corcoran*, 119 Ind. 138, 21 N. E. 468, 12 Am. St. Rep. 390.

^{287a} *Williams v. Harris*, 4 S. D. 22, 54 N. W. 926, 46 Am. St. Rep. 753; note in 90 Am. St. Rep. 497. See ante, § 78.

she gives him money out of her separate estate upon an express promise by him to repay it, the transaction is clearly a loan and the husband is bound to repay the amount loaned.²⁸⁸ There is some conflict of authority, however, as to the nature of the transaction where the husband simply receives and uses his wife's money without an express promise of repayment. The usual rule is that where one person gives money to another at his request, the law will imply a promise to repay, the transaction being presumed to be a loan, and it is held by some courts that this rule applies where the parties are husband and wife, and that the husband takes the money either as the debtor of or trustee for the wife.²⁸⁹ Other courts hold that where the husband receives and uses the wife's money without an express promise of repayment, the transaction is presumed to be a gift from her to him, and not a loan.²⁹⁰ It is probable that the true doctrine

²⁸⁸ *Williams v. Harris*, 4 S. D. 22, 54 N. W. 926, 46 Am. St. Rep. 753; note 90 Am. St. Rep. 540.

A wife is entitled to the same remedies, and has the same standing to enforce any security for the payment of her husband's debt to her, as any other creditor. *Manchester v. Tibbetts*, 121 N. Y. 219, 24 N. E. 304, 18 Am. St. Rep. 816. See, also, *Mayers v. Kaiser*, 85 Wis. 382, 55 N. W. 688, 39 Am. St. Rep. 849.

²⁸⁹ *Parrett v. Palmer*, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479; *King v. King*, 24 Ind. App. 598, 57 N. E. 275, 79 Am. St. Rep. 287; *Sykes v. City Sav. Bank*, 115 Mich. 321, 73 N. W. 369, 69 Am. St. Rep. 562; *Riley v. Vaughan*, 116 Mo. 169, 22 S. W. 707, 38 Am. St. Rep. 586.

²⁹⁰ *Driggs & Co.'s Bank v. Norwood*, 50 Ark. 42, 6 S. W. 323, 7 Am. St. Rep. 78; *Clark v. Patterson*, 158 Mass. 388, 33 N. E. 589, 35 Am. St. Rep. 498; *Beecher v. Wilson*, 84 Va. 813, 6 S. E. 209, 10 Am. St. Rep. 883; *Bennett v. Bennett*, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47; *Crumrine v. Crumrine*, 50 W. Va. 226, 40 S. E. 341, 88 Am. St. Rep. 859.

is that the mere receipt and use of the wife's money by the husband raises no decided presumption either way, and that much will depend upon the circumstances of the case, including the amount involved, whether it was received at one time or at different times,²⁹¹ whether it constitutes the principal of the wife's estate, or merely the income therefrom,²⁹² whether the question arises between the parties themselves, or between them and creditors of either,²⁹³ and other like considerations.

A husband who is indebted to his wife may, in good faith, prefer her as a creditor, and pay his debt to her to the exclusion of his other creditors.²⁹⁴

²⁹¹ Where the wife permits the husband to receive and use the income of her property for a number of years, a gift will be presumed. *Estate of Hauer*, 140 Pa. 420, 21 Atl. 445, 23 Am. St. Rep. 245; *McLure v. Lancaster*, 24 S. C. 273, 58 Am. Rep. 259. See, also, *Wells v. Batts*, 112 N. C. 283, 17 S. E. 417, 34 Am. St. Rep. 506.

²⁹² In *Estate of Hauer*, 140 Pa. 420, 21 Atl. 445, 23 Am. St. Rep. 245, the court said: "A broad and plain distinction is drawn by the cases between the receipt by the husband of the income of the wife's separate property and the receipt by him of the principal or corpus of her estate. A gift of the income may be implied from his receipt of it with her consent, but a gift of the principal will not be presumed from her mere acquiescence in his receipt and use of it." Quoted with approval in *Adone v. Spencer*, 62 N. J. Eq. 782, 49 Atl. 10, 90 Am. St. Rep. 484, 56 L. R. A. 817. And see note in 90 Am. St. Rep. 542, and monographic note in 56 L. R. A. 817.

²⁹³ A wife has the same right to loan money to her husband as to a stranger, but, for the prevention of fraud on his creditors, clear and satisfactory proof of a wife's claim against her husband is exacted to a degree not required of others. *Lahr's Appeal*, 90 Pa. 507. See, also, *Driggs & Co.'s Bank v. Norwood*, 50 Ark. 42, 6 S. W. 323, 7 Am. St. Rep. 78; *Kanawha Valley Bank v. Atkinson*, 32 W. Va. 203, 9 S. E. 175, 25 Am. St. Rep. 806. See monographic note in 56 L. R. A. 817.

²⁹⁴ *German Ins. Co. v. Bartlett*, 188 Ill. 165, 58 N. E. 1075, 80 Am. St. Rep. 172; *Cornell v. Gibson*, 114 Ind. 144, 16 N. E. 130, 5 Am. St.

The statute of limitations does not run as to dealings between husband and wife. This is a consequence of the doctrine of their legal unity of person, which has not been wholly abrogated by the statutes removing the wife's common-law disabilities, and, moreover, the policy of the law is rather to encourage inaction in the prosecution of claims between them than to require the prompt assertion of such claims.²⁹⁵

§ 99. Wife as agent of husband.

A wife may, at common law, as well as under modern statutes, act as the agent of her husband and bind him as such.²⁹⁶ This is not inconsistent with the common-law doctrine that husband and wife are one person in law, for the law of agency is based upon a notional identity of person of principal and agent, in consequence of which the act of the agent, within the scope of the agency, is said to be the act of the principal.²⁹⁷ The wife has, however, by virtue of the marriage relation alone, no authority to bind her husband by contracts of

Rep. 605; *Riley v. Vaughan*, 116 Mo. 169, 22 S. W. 707, 38 Am. St. Rep. 586; *Williams v. Harris*, 4 S. D. 22, 54 N. W. 926, 46 Am. St. Rep. 753; note in 90 Am. St. Rep. 547.

²⁹⁵ 19 Am. & Eng. Enc. Law (2d Ed.) 186; note in 90 Am. St. Rep. 549; *Barnett v. Harshbarger*, 105 Ind. 410, 5 N. E. 718; *Parrett v. Palmer*, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479; *Second Nat. Bank v. Merrill*, 81 Wis. 151, 50 N. W. 505, 29 Am. St. Rep. 877; *Fawcett v. Fawcett*, 85 Wis. 332, 55 N. W. 405, 39 Am. St. Rep. 844. See, also, *Manchester v. Tibbetts*, 121 N. Y. 219, 24 N. E. 304, 18 Am. St. Rep. 816.

²⁹⁶ See cases cited in notes immediately following.

²⁹⁷ *Spencer v. Tissue*, Addison (Pa.) 315. "A woman indeed may be attorney for her husband, for that implies no separation from, but is rather a representation of, her lord." 1 Bl. Comm. 442.

a general nature.²⁹⁸ Except in the case of her contracts for necessities, which the husband, in disregard of his legal duty to support his wife, has failed to provide,²⁹⁹ the wife has no more power to bind her husband by contracts made in his name than has a stranger. The question as to her authority is purely one of agency, and is to be determined according to the principles of the law of agency in general. The husband cannot be held liable for debts contracted by the wife in his name unless he has in some way given her authority to contract such debts.³⁰⁰ This authority, however, in accordance with the general principles of the law of agency, may be either express³⁰¹ or implied,³⁰² and may be conferred before³⁰³ the act of the wife, or afterwards, as where the husband subsequently ratifies what she has done.³⁰⁴

Cases in which the husband expressly authorized the wife in advance to perform the act with which he is sought to be charged, are, of course, quite simple and present no difficulty;³⁰⁵ but it is not always easy to de-

²⁹⁸ Debenham v. Mellon, L. R. 6 App. Cas. 24; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Bergh v. Warner, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362; Tuttle v. Hoag, 46 Mo. 38, 2 Am. Rep. 481.

²⁹⁹ See post, § 115.

³⁰⁰ Montague v. Benedict, 3 Barn. & C. 631, 10 E. C. L. 205; Clark v. Cox, 32 Mich. 204.

A wife can bind her husband as his agent only within the scope of her authority. Goodrich v. Tracy, 43 Vt. 314, 5 Am. Rep. 281.

³⁰¹ See note 303, *infra*.

³⁰² See Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Kriegler v. Smith, 13 Mont. 235, 33 Pac. 937.

³⁰³ See, generally, cases cited throughout this section.

³⁰⁴ Hill v. Sewald, 53 Pa. 271, 91 Am. Dec. 209. See notes 307, 308, *infra*.

termine when the wife's authority to bind her husband should be implied.

In accordance with the general principles of the law of agency, it is held that the authority of the wife to bind the husband by purchases and other contracts made on his credit may be implied from a previous course of dealing between the parties. Thus, where the wife has contracted obligations in her husband's name, and he has discharged such obligations without prohibiting a further extension of credit to the wife, her authority to make similar contracts in the future will be implied, and the husband will be bound thereby.³⁰⁶ So, also, a contract made by the wife in her husband's name, even though unauthorized and not binding on him when made, may become binding by his subsequent ratification thereof. Thus, the husband is bound where, upon learning of the contract, he does not repudiate it, but promises to pay the debt,³⁰⁷ or where, without objection, he permits the wife to retain articles purchased by her on his credit. In the latter case he is bound to pay what the articles were reasonably worth.³⁰⁸

³⁰⁵ All such cases are governed by the general principles of the law of agency.

³⁰⁶ *Keller v. Phillips*, 39 N. Y. 351; *Sibley v. Gilmer*, 124 N. C. 631, 32 S. E. 964; *Cowell v. Phillips*, 17 R. I. 188, 20 Atl. 933, 11 L. R. A. 182; *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713.

The wife's implied authority is presumed to continue until notice to the contrary is given; it is not revoked by the mere separation of the parties. *Sibley v. Gilmer*, 124 N. C. 631, 32 S. E. 964; *Cowell v. Phillips*, 17 R. I. 188, 20 Atl. 933, 11 L. R. A. 182.

³⁰⁷ *Conrad v. Abbott*, 132 Mass. 330.

³⁰⁸ *MacKinley v. McGregor*, 3 Whart. (Pa.) 369, 31 Am. Dec. 522; *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713.

Where the parties live together, it will ordinarily be presumed that the wife has authority to bind her husband for necessities for herself and household; that is, for such articles as fall fairly within the domestic department, which is ordinarily confided to her management, and for articles for her personal use suitable to her husband's means and position in society.³⁰⁹ This presumption is founded upon the well-known fact that in modern society, almost universally, the wife, as the manager of the household, is clothed with authority thus to pledge her husband's credit for articles of ordinary household use.³¹⁰ As was well said in an early case: "Where a wife is living with her husband, and where, in the ordinary arrangements of her husband's household, she gives orders to tradesmen for the benefit of her husband and family, and these orders are proper and not extravagant, it is presumed that she has the authority of her husband for so doing. This rule is founded on common sense, for a wife would be of little use to her husband in their domestic arrangements if she could not order such things as are proper for the use of a house, and for her own use, without the interference of her husband. The law therefore presumes that she does this by her husband's authority."³¹¹ It should be noted that modern statutory provisions regulating the rights and

³⁰⁹ *Baker v. Carter*, 83 Me. 132, 21 Atl. 834, 23 Am. St. Rep. 764; *Clark v. Cox*, 32 Mich. 204; *Flynn v. Messenger*, 28 Minn. 208, 9 N. W. 759, 41 Am. Rep. 279; *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362.

³¹⁰ *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362.

³¹¹ Per Lord Abinger, in *Emmett v. Norton*, 8 Car. & P. 506, 34 E. C. L. 503.

liabilities of married women have not affected either the obligation of the husband to support and maintain the family or the presumption of the wife's authority to act in his behalf in supplying the ordinary wants of his household.³¹²

But the wife's implied authority to bind her husband, arising out of the fact of cohabitation, extends only to contracts for necessities. She cannot, by virtue of such implied authority merely, bind him by any contracts or purchases she may choose to make as his wife.³¹³ Nor can she bind him even for articles technically necessities, where they were not actually necessary for the reason that the husband had already sufficiently supplied her wants.³¹⁴

There is no presumption that a wife living apart from her husband has authority to bind him by her contract for necessities.³¹⁵ As we have just seen, she may or may not have power so to bind him, according to the circumstances of the separation; and in an action

³¹² *Flynn v. Messenger*, 28 Minn. 208, 9 N. W. 759, 41 Am. Rep. 279.

³¹³ *Phillipson v. Hayter*, L. R. 6 C. P. 38; *Clark v. Cox*, 32 Mich. 204.

³¹⁴ *Seaton v. Benedict*, 5 Bing. 28, 15 E. C. L. 354; *Debenham v. Mellon*, L. R. 6 App. Cas. 24; *Wanamaker v. Weaver*, 176 N. Y. 75, 68 N. E. 135, 98 Am. St. Rep. 621, 65 L. R. A. 529.

³¹⁵ It is declared by some authorities that the presumption is against the authority of a wife to bind her husband by her contracts for necessities, where the husband and wife are living apart. *Vusler v. Cox*, 53 N. J. Law, 516, 22 Atl. 347, *Woodruff Cas.* 76; 15 Am. & Eng. Enc. Law (2d Ed.) 883. But since the husband may or may not be liable, according to circumstances, the true rule would seem to be that of the text, namely, that there is no presumption, from the mere fact of separation, either for or against such authority.

against the husband for necessities furnished the wife while living apart, the burden is upon the plaintiff to show that the circumstances of the separation were such as to render the husband liable.³¹⁶ Tradesmen and others supplying the wants of a married woman living separate from her husband are bound to inform themselves as to the cause and circumstances of the separation, or they give credit at their peril;³¹⁷ and a person who furnishes necessities to a married woman separated from her husband through her own fault cannot recover therefor from the husband, although he may have been ignorant of the cause,³¹⁸ or even of the fact, of the separation.³¹⁹

In an action against a husband upon a contract made by his wife, the burden is upon the plaintiff either to show directly that the husband authorized the contract, or to lay before the jury such circumstances as will enable them to presume that such authority was given. In the latter case, if the presumption raised is not rebutted by contrary evidence introduced by the husband, the jury may find against him.³²⁰

³¹⁶ *Mainwaring v. Leslie*, 2 Car. & P. 507, 12 E. C. L. 238; *Clifford v. Laton*, 3 Car. & P. 15, 14 E. C. L. 188; *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421; *Peaks v. Mayhew*, 94 Me. 571, 48 Atl. 172; *Sturbridge v. Franklin*, 160 Mass. 149, 35 N. E. 669.

³¹⁷ *Billing v. Pilcher*, 7 B. Mon. (Ky.) 458, 46 Am. Dec. 523; *McCutchen v. McGahay*, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; *Walker v. Simpson*, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216; and cases cited in notes immediately following.

³¹⁸ *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73.

³¹⁹ *Vusler v. Cox*, 53 N. J. Law, 516, 22 Atl. 347, *Woodruff Cas.* 76.

³²⁰ *Montague v. Benedict*, 3 Barn. & C. 631, 10 E. C. L. 205; *Tuttle v. Hoag*, 46 Mo. 38, 2 Am. Rep. 481.

§ 100. Husband as agent of wife.

At common law, since a married woman's contracts are void, she cannot appoint an agent, and hence, of course, cannot appoint her husband as such.³²¹ There is nothing, however, in the marriage relation, that renders the husband incapable of acting as the wife's agent; the difficulty lies in the wife's incapacity to make the appointment. Wherever, therefore, her disabilities in this respect are removed, as where she is empowered to manage her separate estate, or is given, in general, the status and powers of a *feme sole*, she may appoint her husband as her agent, and he may act as such.³²² As in the case of any other principal, the wife will be bound by any contracts,³²³ and liable for any torts,³²⁴

³²¹ See ante, §§ 83, 95.

³²² Jones v. Chenault, 124 Ala. 610, 27 So. 515, 82 Am. St. Rep. 211; Prentiss v. Paisley, 25 Fla. 927, 7 So. 56, 7 L. R. A. 640; Munger v. Baldrige, 41 Kan. 236, 21 Pac. 159, 13 Am. St. Rep. 273; Taylor v. Wands, 55 N. J. Eq. 491, 37 Atl. 315, 62 Am. St. Rep. 818; Third Nat. Bank v. Guenther, 123 N. Y. 568, 25 N. E. 986, 20 Am. St. Rep. 780; Wronkow v. Oakley, 133 N. Y. 505, 31 N. E. 521, 28 Am. St. Rep. 661; Brown v. Thomson, 31 S. C. 436, 10 S. E. 95, 17 Am. St. Rep. 40; Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 242; Weisbrod v. Chicago, etc., R. Co., 18 Wis. 35, 86 Am. Dec. 743; Wood v. Armour, 88 Wis. 488, 60 N. W. 791, 43 Am. St. Rep. 918; 1 Am. & Eng. Enc. Law (2d Ed.) 942, 958; note in 83 Am. St. Rep. 518.

Where the wife employs her husband as her agent in the management of her property or the conduct of her business, the product of his labor and skill is not subject to the claims of his creditors, though there is some authority to the contrary. Taylor v. Wands, 55 N. J. Eq. 491, 37 Atl. 315, 62 Am. St. Rep. 818, and note; Mayers v. Kaiser, 85 Wis. 382, 55 N. W. 688, 39 Am. St. Rep. 843.

³²³ Maxcy Mfg. Co. v. Barnham, 89 Me. 538, 36 Atl. 1003, 56 Am. St. Rep. 436; Reed v. Morton, 24 Neb. 760, 40 N. W. 282, 8 Am. St. Rep. 247; Bodey v. Thackara, 143 Pa. 171, 22 Atl. 754, 24 Am. St.

made or committed by her husband while acting within the scope of his authority as her agent.

The agency of the husband for the wife, like that of the wife for the husband,³²⁵ will not be inferred from the marital relation alone, but must be established according to the general principles of agency, by proof of a previous appointment by the wife, or subsequent adoption or ratification by her of her husband's acts.³²⁶

§ 101. Suits between husband and wife.

At common law, since husband and wife are regarded as one person, they cannot sue each other in a court of law;³²⁷ but in equity, suits between husband and wife have always been allowed, the wife, if plaintiff, suing by her next friend, and, if defendant, defending as if sole.³²⁸

In many states, statutes now authorize actions be-

Rep. 526; *Nelson v. McDonald*, 80 Wis. 605, 50 N. W. 893, 27 Am. St. Rep. 71.

³²⁴ *Shane v. Lyons*, 172 Mass. 199, 51 N. E. 976, 70 Am. St. Rep. 261.

³²⁵ See ante, § 99.

³²⁶ *Hoffman v. McFadden*, 56 Ark. 217, 19 S. W. 753, 35 Am. St. Rep. 101; *Henry v. Sneed*, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580; *Rust-Owen Lumber Co. v. Holt*, 60 Neb. 80, 82 N. W. 112, 83 Am. St. Rep. 512; 15 Am. & Eng. Enc. Law (2d Ed.) 855.

³²⁷ 10 Enc. Pl. & Pr. 195.

³²⁸ 10 Enc. Pl. & Pr. 195, 197; *Barber v. Barber*, 21 How. (U. S.) 582; *Frankel v. Frankel*, 173 Mass. 214, 53 N. E. 398, 73 Am. St. Rep. 266.

Where a husband brings a bill against his wife he thereby "admits her to be a feme sole," and she must answer as such, and no guardian to defend for her should be appointed. *Ex parte Strangeways*, 3 Atk. 478; *Mitf. Eq. Pl.* 96.

tween husband and wife directly in a court of law.³²⁹ Thus, where a statute authorizes a married woman to sue alone for the recovery of her separate property, she may sue her husband to recover her personal property,³³⁰ or maintain ejectment against him to recover possession of her realty.³³¹

In suits for divorce the wife sues or is sued alone.³³²

§ 102. Wills in each other's favor.

At common law, a husband may give property to his wife by will. The rule, founded upon the legal unity of husband and wife, that the husband cannot transfer property directly to the wife, does not apply to the case of a transfer by will, for a will does not take effect until after the death of the testator, and this event severs the matrimonial union.³³³

But a wife cannot make a will in favor of her husband, for she is presumed to act under his coercion, and hence her will in his favor is not considered as her

³²⁹ See *Wilson v. Wilson*, 36 Cal. 447, 95 Am. Dec. 194; *May v. May*, 9 Neb. 16, 31 Am. Rep. 399.

For an exhaustive note on suits between husband and wife at common law, in equity, and under the statutes, see 73 Am. St. Rep. 268.

³³⁰ *Bruce v. Bruce*, 95 Ala. 563, 11 So. 197.

³³¹ *Cook v. Cook*, 125 Ala. 583, 27 So. 918, 82 Am. St. Rep. 264; *Crater v. Crater*, 118 Ind. 521, 21 N. E. 290, 10 Am. St. Rep. 161; *Manning v. Manning*, 79 N. C. 293, 28 Am. Rep. 324. In the case last cited it was held that, while the action would lie to put the wife in possession, the husband's marital right to occupy the property could not be impaired. See, also, *State v. Jones*, 132 N. C. 1043, 43 S. E. 939, 95 Am. St. Rep. 688.

³³² 7 Enc. Pl. & Pr. 60. See *Van Orden v. Van Orden*, 58 N. J. Eq. 545, 43 Atl. 882.

³³³ 1 Bishop, Mar. Women, §§ 37, 715.

voluntary act.³³⁴ Under modern statutes, however, such wills are valid.³³⁵

§ 103. Liability to each other in tort.

At common law, neither spouse can maintain an action against the other for a personal tort. Thus, the wife cannot recover damages from the husband for an assault and battery,³³⁶ or libel,³³⁷ or any other tort³³⁸ committed during coverture. Nor have the statutes enlarging the rights of married women changed the law in this respect.³³⁹

The fact that the marriage has been dissolved by divorce does not enable the injured party to maintain an action against the other for a tort committed during

³³⁴ 1 Bishop, Mar. Women, §§ 37, 715.

³³⁵ Consult the various statutes.

³³⁶ Phillips v. Barnett, 1 Q. B. Div. 436; Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27; Schultz v. Schultz, 89 N. Y. 644. In denying relief to the wife in such case, the court in the Maine case above cited said: "We are not convinced that it is desirable to have the law as the plaintiff contends it to be. There is no necessity for it. Practically, the married woman has remedy enough. The criminal courts are open to her. She has the privilege of habeas corpus, if unlawfully restrained. As a last resort, if need be, she can prosecute, at her husband's expense, a suit for divorce. If a divorce is decreed to her, she has dower in all his estate, and all her needs and all her causes of complaint, including any cruelties suffered, can be considered by the court, and compensation in the nature of alimony allowed for them. In this way, all matters would be settled in one suit as a finality."

³³⁷ See Smith v. Smith, 73 Mich. 445, 41 N. W. 499, 16 Am. St. Rep. 594.

³³⁸ Bandfield v. Bandfield, 117 Mich. 80, 75 N. W. 287, 72 Am. St. Rep. 550, 40 L. R. A. 757.

³³⁹ Libby v. Berry, 74 Me. 286, 43 Am. Rep. 589; Bandfield v. Bandfield, 117 Mich. 80, 75 N. W. 287, 72 Am. St. Rep. 550.

coverture. The coverture does not merely suspend the remedy,—it prevents any right of action from arising.³⁴⁰

V. RIGHTS OF HUSBAND AND WIFE AGAINST THIRD PERSONS.

§ 104. On contract.

The rights of husband or wife or both on contracts made with third persons will depend, of course, on the validity of the particular contract. Since the husband is under no disability to contract with third persons, he may enforce such contracts whenever they are enforceable under the law of contracts generally. On the other hand, since the wife, at common law, is unable to make a valid contract, she cannot, in general, enforce her attempted contracts against the other parties thereto, at least so long as the contract is wholly executory.³⁴¹ This branch of the subject calls for no particular discussion, having already been sufficiently treated incidentally in other connections.

§ 105. In tort—Wrongs against right of cohabitation—In general.

There are several serious wrongs which may be committed by third persons against the right of marital

³⁴⁰ *Phillips v. Barnett*, 1 Q. B. Div. 436; *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27; *Bandfield v. Bandfield*, 117 Mich. 80, 75 N. W. 287, 72 Am. St. Rep. 550, 40 L. R. A. 757.

Nor can a divorced woman maintain an action against a third person for a tort committed by him against her during coverture at the instance of her husband. *Libby v. Berry*, 74 Me. 236, 43 Am. Rep. 589.

³⁴¹ It seems that a contract executed by the wife, but not by the other party, may be enforced against the latter. 15 Am. & Eng. Enc. Law (2d Ed.) 791. And, in such case, the wife, having executed the contract, cannot repudiate it, but is bound by it, although

cohabitation. These are the abduction by force or fraud of husband or wife, enticing or persuading either spouse to desert the other, alienating the affections of husband or wife, and criminal conversation with either spouse. These wrongs are all more or less alike in their nature, and two or more of them frequently occur together, and are made the subject of the same action for damages. Thus, a man may win the affections of another's wife and induce her to leave her husband and live in adultery with himself, thus committing three of the wrongs at once in accomplishing his general purpose of possessing the wife of another. Each act, however, is a distinct injury, and may be made the subject of an independent action. We shall examine the several cases in detail.

§ 106. Same—Abduction or enticement of spouse.

Whoever, by force or fraud, takes a man's wife away from him,³⁴² or by persuasion induces her to leave him without sufficient cause,³⁴³ is liable to the husband for the injury thus done him in depriving him of his wife's society. The gist of the husband's action in such case is the loss of the *consortium*,—that is, of the com-

she was not liable on the contract so long as it remained executory. *Warwick v. Lawrence*, 43 N. J. Eq. 179, 10 Atl. 376, 3 Am. St. Rep. 299.

³⁴² 3 Bl. Comm. 139; 1 Am. & Eng. Enc. Law (2d Ed.) 163. The abduction of a wife practically never occurs, and there is, therefore, very little law on the subject.

³⁴³ *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 435; *Barbee v. Armstead*, 10 Ired. (N. C.) 530, 51 Am. Dec. 404; *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791; *Gilchrist v. Bale*, 8 Watts (Pa.) 355, 34 Am. Dec. 469; 1 Am. & Eng. Enc. Law (2d Ed.) 163; and cases cited in notes immediately following.

fort, society, and services of the wife.³⁴⁴ It is not necessary, to give a right of action, that the defendant should have been criminally intimate with the wife.³⁴⁵ And where the action is for enticing the wife away, the fact that the wife consented is immaterial; she has no power to consent to disregard her marital duty.³⁴⁶ Moreover, if the defendant's conduct was the controlling cause, it is not necessary that it should have been the sole cause, of the wife's desertion. The fact that there were contributing causes, such as unhappy relations between the husband and wife, will not excuse the defendant, but is a circumstance to be considered in estimating damages, not because the defendant is the less to blame, but because, in the circumstances, the loss to the husband is less than it might have been if the relations between the parties had been more satisfactory.³⁴⁷ But the defendant must have been active in causing the wife's desertion. If she leaves her husband on account of his own misconduct or for other reason, without the defendant's interference, there is no liability.³⁴⁸ Thus, a person who, from motives of humanity and not from any improper motive, merely harbors a wife who has left her husband for good reason, is not liable to the husband.³⁴⁹ And even where the defendant was active

³⁴⁴ *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485.

³⁴⁵ *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485.

³⁴⁶ *Higham v. Vanosdol*, 101 Ind. 160.

³⁴⁷ *Hadley v. Heywood*, 121 Mass. 236.

³⁴⁸ *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485.

³⁴⁹ 1 Am. & Eng. Enc. Law (2d Ed.) 164, and case cited in notes immediately following. "The old law was so strict in this point that, if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned." 3 Bl. Comm. 139.

in procuring the wife's desertion, the purity of his motives may be shown in mitigation of damages, and in some cases may constitute a complete defense.³⁵⁰ This is especially true where an action is brought against a parent or the parents of the wife for enticing her away or harboring her after desertion. Larger privileges are allowed by the law in this connection to a parent than to a stranger;³⁵¹ but even a parent may be held liable where he acted from improper motives in inducing his daughter to leave her husband.³⁵²

At common law, a wife could not maintain an action for damages against one who deprived her of the society or affections of her husband. It is a matter of some doubt whether a wife had, at common law, any right to her husband's society which the law would recognize, but, assuming that the right existed, she could not enforce it, for the technical reason that she was not competent to sue, and, furthermore, any damages recovered would belong to the husband.³⁵³ It is clear,

³⁵⁰ *Tasker v. Tasker*, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468; note in 44 Am. St. Rep. 850.

³⁵¹ *Oakman v. Belden*, 94 Me. 280, 47 Atl. 553, 80 Am. St. Rep. 396; *Tucker v. Tucker*, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623; *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791; and cases cited in note immediately following.

³⁵² *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196; *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791; *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085. So, also, where the action is brought by the wife. *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614; *Price v. Price*, 91 Iowa, 693, 60 N. W. 202, 51 Am. St. Rep. 360, 29 L. R. A. 150; *Hodgkinson v. Hodgkinson*, 43 Neb. 269, 61 N. W. 577, 47 Am. St. Rep. 759, 27 L. R. A. 120; *Brown v. Brown*, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574; *Gernard v. Gernard*, 185 Pa. 233, 39 Atl. 884, 64 Am. St. Rep. 646, 40 L. R. A. 549.

³⁵³ *Smith v. Smith*, 98 Tenn. 101, 38 S. W. 439, 60 Am. St. Rep.

however, that the actual injury to the wife in such a case is as great as the corresponding injury to the husband, and in a number of states, under statutes giving the wife a separate existence, and placing her, in respect to personal and property rights, upon an equality with her husband, it is held that she may maintain an action against any one who deprives her of the society and affections of her husband, the action being generally brought for the combined wrong.³⁵⁴ Where the statutes merely remove the wife's disability to sue, the cases holding that she may maintain such an action hold, some in terms and all in effect, that the right of action

838; *Duffies v. Duffies*, 76 Wis. 371, 45 N. W. 523, 20 Am. St. Rep. 79, 8 L. R. A. 420; and cases cited in note immediately following. One reason assigned by Blackstone for denying the wife's right of action is that "the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury." 3 Bl. Comm. 142.

³⁵⁴ *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614; *Reed v. Reed*, 6 Ind. App. 317, 38 N. E. 638, 51 Am. St. Rep. 310; *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389, 28 Am. St. Rep. 213, 14 L. R. A. 787; *Price v. Price*, 91 Iowa, 693, 60 N. W. 202, 51 Am. St. Rep. 360, 29 L. R. A. 150; *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 549; *Clow v. Chapman*, 125 Mo. 101, 28 S. W. 328, 46 Am. St. Rep. 468, 26 L. R. A. 412; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; *Brown v. Brown*, 124 N. C. 19, 32 S. E. 320, 38 L. R. A. 242, 70 Am. St. Rep. 574; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Gernard v. Gernard*, 185 Pa. 233, 39 Atl. 884, 64 Am. St. Rep. 646, 40 L. R. A. 549; *Smith v. Smith*, 98 Tenn. 101, 38 S. W. 439, 60 Am. St. Rep. 838; *Beach v. Brown*, 20 Wash. 266, 55 Pac. 46, 72 Am. St. Rep. 98, 43 L. R. A. 114. But see, contra, *Duffies v. Duffies*, 76 Wis. 371, 45 N. W. 523, 20 Am. St. Rep. 79, 8 L. R. A. 420. See, generally, 1 Am. & Eng. Enc. Law (2d Ed.) 166, and note in 46 Am. St. Rep. 472.

existed at common law, and the only effect of the statutes is to make it enforceable.³⁵⁵

Where a man's wife is kept away from him in custody against her will, he may recover her person by the writ of habeas corpus,³⁵⁶ but not where she remains away from him voluntarily and without restraint.³⁵⁷ It is said that a wife has a corresponding right, but there seem to be no decisions to that effect.³⁵⁸

§ 107. Same—Alienation of affections.

A true marriage relation being founded upon mutual affection, it is plainly a grievous wrong for any one to mar this relation by depriving either consort of the affections of the other; and it is held that a husband may, at common law, maintain an action against one who alienates his wife's affections.³⁵⁹ The alienation of affections is usually accompanied by inducing the wife to leave her husband, and sometimes by criminal con-

³⁵⁵ That the right exists at common law and is simply made enforceable by the statutes, see *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027, 8 Am. St. Rep. 258, 6 L. R. A. 329, *Woodruff*, Cas. 189; *Betser v. Betser*, 186 Ill. 537, 58 N. E. 249, 78 Am. St. Rep. 303, 52 L. R. A. 630; *Dietzman v. Mullin*, 108 Ky. 610, 57 S. W. 247, 94 Am. St. Rep. 390, 50 L. R. A. 808; *Wolf v. Frank*, 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102; *Hodgkinson v. Hodgkinson*, 43 Neb. 269, 61 N. W. 577, 47 Am. St. Rep. 759, 27 L. R. A. 120; *Smith v. Smith*, 98 Tenn. 101, 38 S. W. 439, 60 Am. St. Rep. 838.

³⁵⁶ *Rex v. Winton*, 5 Term R. 89; 15 Am. & Eng. Enc. Law (2d Ed.) 181.

³⁵⁷ *Rex v. Clarkson*, 1 Strange, 444; *Rex v. Mead*, 1 Burrows, 542; *Ex parte Sandilands*, 12 Eng. Law & Eq. 463; *Reg. v. Leggatt*, 18 Q. B. 781, 83 E. C. L. 781.

³⁵⁸ 15 Am. & Eng. Enc. Law (2d Ed.) 181.

³⁵⁹ See, generally, 15 Am. & Eng. Enc. Law (2d Ed.) 862, and note in 44 Am. St. Rep. 845.

versation;³⁶⁰ but an action may be maintained for the alienation of the wife's affections, although she neither leaves her husband nor yields her person to the defendant.³⁶¹ The gist of the action, as in the case of other wrongs of this character, is loosely said to be the loss of the *consortium*, that is, of the companionship, society, or assistance of the wife;³⁶² but more specifically and correctly it is the loss of the affections alone, with whatever follows therefrom, loss of the wife's society and services not being a necessary consequence. It is not necessary, in such action, to prove any actual pecuniary loss.³⁶³

It has been held that the wife cannot, at common law, maintain a corresponding action for the alienation of the affections of her husband,³⁶⁴ but she may do so

³⁶⁰ See *Prettyman v. Williamson*, 1 Pennewill (Del.) 224, 39 Atl. 731; *Fratini v. Caslini*, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843.

³⁶¹ *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266. See, also, *Rinehart v. Bills*, 82 Mo. 534, 52 Am. Rep. 385, *Woodruff Cas.* 187. The doctrine of the text is denied in *Lellis v. Lambert*, 24 Ont. App. 653, quoted with approval in *Houghton v. Rice*, 174 Mass. 366, 54 N. E. 843, 47 L. R. A. 310, 75 Am. St. Rep. 351.

³⁶² See *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266; *Fratini v. Caslini*, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843.

³⁶³ *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266.

³⁶⁴ See 15 Am. & Eng. Enc. Law (2d Ed.) 864, and cases cited in note 353, *supra*. It was so held in *Houghton v. Rice*, 174 Mass. 366, 54 N. E. 843, 75 Am. St. Rep. 351, 47 L. R. A. 310; but the decision seems to have been based upon the doctrine that no action may be maintained by either husband or wife for mere alienation, without loss of consortium,—a doctrine opposed by the overwhelming weight of authority.

under modern statutes removing her common-law disabilities.³⁶⁵

Actions for alienation of affections alone are rare, the action usually being for this wrong combined with enticement or criminal conversation.

§ 108. Same—Criminal conversation.

A husband may, at common law, maintain an action, known as an action for criminal conversation, against a man who has sexual intercourse with his wife.³⁶⁶ Criminal conversation with another man's wife is a wrong entirely distinct from that of inducing a wife to leave her husband, or of alienating a wife's affections, though these wrongs frequently accompany each other, and are often made the subject of the same action. The gist of this particular action is the invasion of the husband's exclusive right of marital intercourse with his wife, and it is immaterial whether the inter-

³⁶⁵ In *Postlewaite v. Postlewaite*, 1 Ind. App. 473, 28 N. E. 99, and *Beach v. Brown*, 20 Wash. 266, 55 Pac. 46, 72 Am. St. Rep. 98, 43 L. R. A. 114, it was held that a divorced wife might maintain an action for the alienation of the affections of her former husband. In *Holmes v. Holmes*, 133 Ind. 386, 32 N. E. 932, it was held that a wife might maintain an action at common law for the alienation of the affections of her husband. In numerous cases, actions by a wife for the alienation of the husband's affections, and causing him to desert her, have been maintained. See *Foot v. Card*, 53 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, *Woodruff Cas.* 189, and cases cited in note 354, *supra*.

³⁶⁶ See cases cited in notes immediately following, and see, generally, 8 Am. & Eng. Enc.-Law (2d Ed.) 260.

The common-law action was abolished in England in 1857 by the Divorce and Matrimonial Causes Act, which, however, gave a somewhat similar substitute remedy. See *Keyes v. Keyes*, L. R. 11 Prob. Div. 100.

course be accomplished with the consent of the wife or by force.³⁶⁷ But if the husband consented to or connived at the seduction, he cannot recover.³⁶⁸ In estimating damages, the jury may take into account the character and conduct of the plaintiff as a husband, as well as that of the wife, together with the nature of the relations between them, as harmonious or otherwise,

³⁶⁷ *Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442; *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307, *Woodruff Cas.* 193; *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260; *Jacobsen v. Sidal*, 12 Or. 280, 7 Pac. 108, 53 Am. Rep. 360. See, also, *Evans v. O'Connor*, 174 Mass. 287, 54 N. E. 557, 75 Am. St. Rep. 316. For a discussion of the nature of this injury, with an extensive review of the cases, see *Tinker v. Colwell*, 193 U. S. 473, affirming 169 N. Y. 531, 62 N. E. 668, 98 Am. St. Rep. 587, 58 L. R. A. 765.

In England it has been held that the gist of the action is the loss of the comfort and society of the plaintiff's wife, and that, therefore, the husband cannot recover if he was living apart from the wife at the time of the alleged wrong. *Weedon v. Timbrell*, 5 Term R. 357. Expressions are found, also, in some of the American decisions, to the effect that the gist of the action is the loss of the consortium; these cases, however, at the same time recognizing that the real injury is the invasion of the husband's exclusive marital right. See *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307; *Cross v. Grant*, 62 N. H. 675, 13 Am. St. Rep. 607. And in this country it is held that the fact that the parties were living apart does not affect the husband's right. *Michael v. Dunkle*, 84 Ind. 544, 43 Am. Rep. 100; *Cross v. Grant*, 62 N. H. 675, 13 Am. St. Rep. 607. See, contra, the early case, *Fry v. Derstler* (1798) 2 Yeates (Pa.) 278. So, also, the husband may recover for the rape of his wife, though he would not, in such case, ordinarily lose her comfort and society. See *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260. Again, where the wife consented to the intercourse, the husband may condone her offense and continue to live with her without losing his right to recover from her seducer. *Sikes v. Tippins*, 85 Ga. 231, 11 S. E. 662.

³⁶⁸ *Cook v. Wood*, 30 Ga. 891, 76 Am. Dec. 677; *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539. See, also, *Gleason v. Knapp*, 56 Mich. 291, 22 N. W. 865, 56 Am. Rep. 388.

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and also the circumstances of the seduction, and, according to the weight of authority, the pecuniary condition and social rank of the parties.³⁶⁹

At common law, the wife had no corresponding right of action against the seductress of her husband,³⁷⁰ but possibly such action may be maintained under the statutes enlarging the rights and privileges of married women.³⁷¹ The better doctrine, however, seems to be that the wife has no such right, even under the modern statutes.

³⁶⁹ See *Keyse v. Keyse*, L. R. 11 Prob. Div. 100; *Prettyman v. Williamson*, 1 Pennewill (Del.) 224, 39 Atl. 731; *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539; *Peters v. Lake*, 66 Ill. 206, 16 Am. Rep. 593; *Cross v. Grant*, 62 N. H. 675, 13 Am. St. Rep. 607; *Torre v. Summers*, 2 Nott & McC. (S. C.) 267, 10 Am. Dec. 597; *Shattuck v. Hammond*, 46 Vt. 466, 14 Am. Rep. 631. The mere fact that there was no affection between the plaintiff and his wife (*Dallas v. Sellers*, 17 Ind. 479, 79 Am. Dec. 489), or that the plaintiff had himself been guilty of adultery (*Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539), is no defense, though these facts may be shown in mitigation of damages.

³⁷⁰ *Doe v. Roe*, 82 Me. 503, 20 Atl. 83, 17 Am. St. Rep. 499, 8 L. R. A. 833.

³⁷¹ It was in terms so held in *Seaver v. Adams*, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597. It is not clear, however, whether the court did not consider the action as substantially the same as an action for enticing away the husband and depriving the wife of his society, which is distinct from an action for criminal conversation. In *Kroessin v. Keller*, 60 Minn. 372, 62 N. W. 438, 51 Am. St. Rep. 533, 27 L. R. A. 685, *Woodruff Cas.* 195, it was held that a wife could not maintain, either at common law or under the statutes, an action against a woman with whom the husband had committed adultery. This appears to be the only case in which the very obvious distinction between an action for criminal conversation and an action for enticement is clearly recognized and acted upon, and the reasoning of the court seems conclusive. In *Hart v. Knapp*, 76 Conn. 135, 55 Atl. 1021, 100 Am. St. Rep. 989, it was held that a wife might maintain an action against another woman for alien-

In order to sustain an action for criminal conversation, there must be actual proof of the marriage, a mere presumption of marriage not being sufficient. The rule in such actions is the same as in criminal prosecutions for bigamy or adultery.³⁷²

A man engaged to marry cannot maintain an action for the seduction of his betrothed, or the alienation of her affections, although in such case he has undoubtedly suffered a grievous wrong.³⁷³ But a man who is induced to marry a woman, in the belief that she is virtuous, by the false representations of a man by whom she is in fact pregnant, may maintain an action for damages against the wrongdoer.³⁷⁴

§ 109. Injuries to wife's person or reputation.

Two causes of action may arise at common law from an injury to the person or reputation of the wife, committed before or after marriage, such as assault and battery, slander, malicious prosecution, and the like. One of these is the injury directly to the wife herself, and the other is the consequential injury to the husband, consisting in the loss of the wife's society or services, or any expense to which he may have been put.³⁷⁵

ating the affections of her husband, committing adultery with him, and causing him to abandon her, and that it was no defense that the husband was the active and aggressive party, and that the defendant yielded to his persuasions.

³⁷² 3 Bl. Comm. 140. See ante, § 56.

³⁷³ Case v. Smith, 107 Mich. 416, 65 N. W. 279, 61 Am. St. Rep. 341.

³⁷⁴ Kujec v. Goldman, 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156.

³⁷⁵ See, generally, Cooley, Torts, 226, 227; Schouler, Dom. Rel. §

For the injury to the wife herself the husband and wife may sue jointly at common law. The action, in such case, is regarded as the action of the wife, she being the "meritorious cause" of the action; but since she cannot sue alone at common law, her husband must join in the suit.³⁷⁶ As was said by the court in a recent case:³⁷⁷ "At common law, on account of the well-settled doctrine of marital unity, the right of a married woman to prosecute an action in her own name for the redress of personal injuries was denied. The cause of action for a personal injury to a married woman, whether committed before or after marriage, at common law, belonged to her; but, on account of the disability of coverture, she had no remedy unless the husband joined in bringing the suit for conformity. The right of action was hers, but, owing to the legal fiction of the unity of husband and wife, she could not assert it." The damages, however, if recovered during coverture, belong to the husband, as in the case of any other chose in action.³⁷⁸ If before or pending the ac-

77; *Smith v. St. Joseph*, 55 Mo. 456, 17 Am. Rep. 660; notes in 94 Am. Dec. 591.

³⁷⁶ *Ballard v. Russell*, 33 Me. 620, 54 Am. Dec. 620; *Wolf v. Bauereis*, 72 Md. 481, 19 Atl. 1045, 8 L. R. A. 680; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17; *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Pac. 1021, 28 Am. St. Rep. 72.

³⁷⁷ *Smith v. Smith*, 98 Tenn. 101, 38 S. W. 438, 60 Am. St. Rep. 838.

³⁷⁸ *Shaddock v. Clifton*, 22 Wis. 114, 94 Am. Dec. 583.

Since the husband is entitled to the damages recovered, his admission of facts tending to defeat the action are competent evidence. *Shaddock v. Clifton*, 22 Wis. 114, 94 Am. Dec. 583. But see *Burrell Tp. v. Uncapher*, 117 Pa. 353, 11 Atl. 619, 2 Am. St. Rep. 664. And a discharge or release by the husband is a bar to the action. *Ballard v. Russell*, 33 Me. 620, 54 Am. Dec. 620; *Beach*

tion, the husband dies, the cause of action survives to the wife, since the injury is to her.³⁷⁹ If the wife dies, the cause of action or suit abates unless preserved by statute, since a right of action for personal injuries dies with the person.³⁸⁰

The various married woman's acts have greatly affected the foregoing rules of the common law. In many, perhaps most, of the states, the wife may sue alone for torts committed against her, and the damages recovered are her separate property.³⁸¹ In other states the common law remains in force to a greater or less extent.³⁸²

v. Beach, 2 Hill (N. Y.) 260, 38 Am. Dec. 584. So, also, his contributory negligence may defeat the action, at least where the common-law rules remain in force. *Pennsylvania R. Co. v. Goodenough*, 55 N. J. Law, 577, 28 Atl. 3, 22 L. R. A. 460. See, also, *McFadden v. Santa Ana, O. & T. St. Ry. Co.*, 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252. But see *Louisville, N. A. & C. Ry. Co. v. Creek*, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548. But the wife's release will not defeat the joint action. *Snashall v. Metropolitan R. Co.*, 8 Mackey (D. C.) 399, 10 L. R. A. 746.

³⁷⁹ 15 Am. & Eng. Enc. Law (2d Ed.) 859.

³⁸⁰ 15 Am. & Eng. Enc. Law (2d Ed.) 859; *Louisville & N. R. Co. v. McElwain*, 98 Ky. 700, 34 S. W. 236, 34 L. R. A. 788.

³⁸¹ See 15 Am. & Eng. Enc. Law (2d Ed.) 859; 10 Enc. Pl. & Pr. 206; *Harmon v. Old Colony R. Co.*, 165 Mass. 100, 42 N. E. 505, 52 Am. St. Rep. 499; *Filer v. New York Cent. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17; *Walker v. City of Philadelphia*, 195 Pa. St. 168, 45 Atl. 657, 78 Am. St. Rep. 801.

³⁸² 10 Enc. Pl. & Pr. 207. The statutes relating merely to property rights and the wife's contracts do not change the common-law rules as to actions for personal injuries. See *Snashall v. Metropolitan R. Co.*, 8 Mackey (D. C.) 399, 10 L. R. A. 746; *Ballard v. Russell*, 33 Me. 196, 54 Am. Dec. 620; *Shaddock v. Clifton*, 22 Wis. 114, 94 Am. Dec. 588.

For the separate loss or damage resulting consequentially to the husband from the injury to the wife, as in the loss of her society or services, or in putting him to expense, the husband may bring a separate action in his own name.³⁸³ This right of action is not taken away by the statutes enabling a married woman to engage in business on her own account.³⁸⁴ Except in so far as statutes give her the right to the fruits of her own labor and services,³⁸⁵ the wife has no right of re-

³⁸³ 15 Am. & Eng. Enc. Law (2d Ed.) 861; *McWhirter v. Hatten*, 42 Iowa, 288, 20 Am. Rep. 618; *Bowdle v. Detroit St. Ry. Co.*, 103 Mich. 272, 61 N. W. 529, 50 Am. St. Rep. 366; *Skoglund v. Minneapolis St. R. Co.*, 45 Minn. 330, 47 N. W. 1071, 11 L. R. A. 222; *Smith v. St. Joseph*, 55 Mo. 456, 17 Am. Rep. 660; *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 669, 15 S. W. 315, 22 Am. St. Rep. 800; *Holleman v. Harward*, 119 N. C. 150, 25 S. E. 972, 56 Am. St. Rep. 572, 34 L. R. A. 803; *Walker v. City of Philadelphia*, 195 Pa. 168, 45 Atl. 657, 78 Am. St. Rep. 801; *Hunt v. Winfield*, 36 Wis. 154, 17 Am. Rep. 482; *Selleck v. City of Janesville*, 104 Wis. 570, 80 N. W. 944, 76 Am. St. Rep. 892.

The term "society," in this connection, means such capacities for usefulness, aid, and comfort, as a wife, as the wife possessed at the time of the injury. Any diminution of these capacities by the defendant's tort constitutes a basis for an award of damages. *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 669, 15 S. W. 315, 22 Am. St. Rep. 800.

The loss of prospective offspring by the wife's miscarriage cannot be considered as an element of damages to the husband. *Butler v. Manhattan R. Co.*, 143 N. Y. 417, 38 N. E. 454, 26 L. R. A. 46. The wife's contributory negligence is a defense to the husband's action. *Chicago, etc., R. Co. v. Honey*, 63 Fed. 39, 26 L. R. A. 42.

³⁸⁴ *Citizens' St. R. Co. v. Twiname*, 121 Ind. 375, 23 N. E. 159, 7 L. R. A. 352; *McWhirter v. Hatten*, 42 Iowa, 288, 20 Am. Rep. 618; *Kelley v. New York, N. H. & H. R. Co.*, 168 Mass. 308, 46 N. E. 1063, 60 Am. St. Rep. 397, 38 L. R. A. 631; *Filer v. New York Cent. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327.

³⁸⁵ See *Fleming v. Town of Shenandoah*, 67 Iowa, 505, 25 N. W. 752, 56 Am. Rep. 354; *Harmon v. Old Colony R. Co.*, 165 Mass. 100, 42 N. E. 505, 52 Am. St. Rep. 499.

covery for the loss of her own labor or services,³⁸⁶ nor can she be joined with the husband in his action;³⁸⁷ nor should the two causes of action just considered be joined in the same suit.³⁸⁸

The effect of the wife's death as a result of the tort upon the husband's right to recover for the loss of the *consortium* will depend upon whether or not death was instantaneous. If death results immediately from the injury, the husband cannot recover; but if death is not immediate, he may recover for the loss of the wife's society and services from the date of the injury until the wife's death.³⁸⁹

At common law, neither spouse can recover for the instantaneous death of the other as the result of a tort, but such a right is now generally given by statute.³⁹⁰

§ 110. Injuries to wife's property.

At common law, since by the marriage the husband becomes the owner of his wife's personal property in possession, he or his representative sues alone for injuries to such property committed during coverture, the injury in such case being an injury to his property. So, also, for injuries to the wife's real estate affecting

³⁸⁶ *Filer v. New York Cent. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Uransky v. Dry Dock, E. B. & B. R. Co.*, 118 N. Y. 304, 23 N. E. 451, 16 Am. St. Rep. 759.

³⁸⁷ 1 Bishop, Mar. Women, § 913; *Todd v. Redford*, 11 Mod. 264.

³⁸⁸ 1 Bishop, Mar. Women, § 913.

³⁸⁹ *Baker v. Bolton*, 1 Camp. 493; *Louisville & N. R. Co. v. McElwain*, 98 Ky. 700, 34 S. W. 236, 34 L. R. A. 788. In this case, however, it was held that the husband's right was merged in the more extensive right to recover for the wife's death, given by statute.

³⁹⁰ See 8 Am. & Eng. Enc. Law (2d Ed.) 851; Cooley, Torts, 262; notes in 70 Am. St. Rep. 669, and 34 L. R. A. 788.

its enjoyment merely. Since he has a right to the enjoyment of the property, any injury thereto is an injury to him alone, and does not affect the wife. But for waste, which is a permanent injury to the inheritance, the husband and wife must sue jointly, and, if he dies before or pending suit, the action survives to her or her heir. The injury in this case is to the wife, but the husband must join in the suit since the wife cannot sue alone. For injuries to the wife's real or personal property committed before marriage, husband and wife may sue jointly. If he dies, the cause of action survives to her. If she dies, it survives to her personal representatives or heirs.³⁹¹

Under the statutes taking away the husband's right to the wife's property, any cause of action for a tort to her real or personal property belongs to her and constitutes a part of her separate estate.³⁹²

VI. LIABILITY OF HUSBAND AND WIFE TO THIRD PERSONS.

§ 111. On the husband's contracts.

Since marriage imposes no contractual disability upon the husband, he is, of course, liable on his own contracts, whether made before or after the marriage.³⁹³ He is also bound by contracts made by his wife as his agent.³⁹⁴

³⁹¹ 1 Chitty, Plead. (16th Am. Ed.) 83-85; 1 Bishop, Mar. Women, §§ 91, 576-578; Schouler, Dom. Rel. §§ 77, 89; 10 Enc. Pl. & Pr. 209-216.

³⁹² See *Pierson v. Smith*, 9 Ohio St. 554, 75 Am. Dec. 486.

³⁹³ 15 Am. & Eng. Enc. Law (2d Ed.) 867. The husband cannot escape liability on his own contracts by making them in his wife's name. *Shields v. Casey*, 155 Pa. 253, 25 Atl. 619, 35 Am. St. Rep. 879.

³⁹⁴ See post, § 114, and ante, § 99.

Where a husband executes a contract jointly with his wife, he is bound thereby, although the contract, by reason of her disability, is not binding on the wife.³⁹⁵ The wife, of course, is not liable on the contracts of her husband.

§ 112. On the wife's antenuptial contracts.

At common law the husband is liable during coverture for all debts contracted by the wife before marriage.³⁹⁶ This liability seems to follow necessarily from the fact that, since the existence of the wife is merged in that of the husband, he must be held liable, or no one can be, and the law will not permit the rights of creditors to be defeated by the marriage of their debtor. The husband's liability is also placed upon the ground that, since he acquires by the marriage the absolute title to her personalty, and all the income from her realty, it is proper that he should pay her debts. In other words, he takes the wife and her property *cum onere*.³⁹⁷ His liability does not depend, however, upon his having obtained property from her by the marriage, for he is liable, whether he so obtained any property or not.³⁹⁸

³⁹⁵ *Browning v. Carson*, 163 Mass. 255, 39 N. E. 1037.

³⁹⁶ 1 Bl. Comm. 443; 1 Bishop, Mar. Women, § 58; 2 Bishop, Mar. Women, §§ 308-318; 2 Kent, Comm. 143; Schouler, Dom. Rel. §§ 56, 57; 15 Am. & Eng. Enc. Law (2d Ed.) 867-871; *Kies v. Young*, 64 Ark. 381, 42 S. W. 669, 62 Am. St. Rep. 198; *Allen v. McCullough*, 2 Heisk. (Tenn.) 174, 5 Am. Rep. 27. See note in 60 Am. Dec. 259.

³⁹⁷ See 2 Bishop, Mar. Women, §§ 312, 313.

³⁹⁸ 1 Bishop, Mar. Women, § 313.

The husband is liable for the wife's antenuptial debts although by antenuptial contract each may have relinquished all interest in the property of the other. *Powell v. Manson*, 22 Grat. (Va.) 178.

The right of the wife's creditors to enforce their claims against the husband cannot be taken away, without their consent, by an antenuptial contract between husband and wife providing that he shall not be liable for her debts.³⁹⁹

The husband's liability for his wife's debts continues only during coverture. If the wife dies without the debt having been collected or reduced to a judgment against the husband and wife, the husband's liability ceases, although he may retain her fortune accruing to him by the marriage.⁴⁰⁰ So, also, if the husband dies first, his estate is not liable. In such case, the surviving wife again becomes liable, although by her marriage she may have lost to her husband her fortune, on the credit of which the debts were contracted.⁴⁰¹

An action to recover an antenuptial debt of the wife must be brought against the husband and wife jointly, the husband being made defendant because he is liable for the debt, and the wife because the debt is in fact hers.⁴⁰²

The fact that the husband was an infant at the time of the marriage is no defense to an action against him

³⁹⁹ *Coles v. Hurt*, 75 Va. 399.

⁴⁰⁰ *Lamb v. Belden*, 16 Ark. 539, *Woodruff Cas.* 65; *Williams v. Kent*, 15 Wend. (N. Y.) 360; *Cole v. Shurtleff*, 41 Vt. 311, 98 Am. Dec. 587; *Hawthorne v. Beckwith*, 89 Va. 786, 17 S. E. 241.

It has been held the divorce of the parties does not terminate the husband's liability (*Allen v. McCullough*, 2 Heisk. [Tenn.] 174, 5 Am. Rep. 27), but this seems doubtful.

⁴⁰¹ 2 Bishop, Mar. Women, § 311.

⁴⁰² 15 Am. & Eng. Enc. Law (2d Ed.) 868; *Gray v. Thacker*, 4 Ala. 136, *Woodruff Cas.* 66; *Keller v. Hicks*, 22 Cal. 457, 83 Am. Dec. 78; *Cole v. Seeley*, 25 Vt. 220, 60 Am. Dec. 258.

for his wife's antenuptial debts. His liability does not depend upon any contract on his part, but is simply an incident to the marriage.⁴⁰³ The infancy of the wife, however, at the time of making the contract, may be a good defense. In order to render the husband liable, the wife's contract must have been binding upon her before the marriage,⁴⁰⁴ and, if her infancy would have been a good defense to an action against her while sole, the husband cannot be held liable; but if the contract was binding upon her, although an infant, as in the case of a contract for necessities, the husband is liable.⁴⁰⁵ The statute of limitations is, of course, a good defense to the action, and although the cause of action does not accrue against the husband until the marriage, the statute begins to run in his favor from the time the cause of action accrued against the wife.⁴⁰⁶

The common-law rule as to the husband's liability has been changed in some states by statutes providing in express terms that the husband shall not be liable for the wife's antenuptial debts.⁴⁰⁷ In other states it is provided that the husband shall be liable only when he has received property from the wife by the marriage,

⁴⁰³ *Roach v. Quick*, 9 Wend. (N. Y.) 238; *Cole v. Seeley*, 25 Vt. 220, 60 Am. Dec. 258.

⁴⁰⁴ A contract not enforceable against the wife before marriage cannot be enforced against the husband. *Musick v. Dodson*, 70 Mo. 624, 43 Am. Rep. 780. In this case it was held that a contract made by a woman while married, and hence incapable of contracting, was not binding on her subsequent husband.

⁴⁰⁵ *Cole v. Seeley*, 25 Vt. 220, 60 Am. Dec. 258.

⁴⁰⁶ 15 Am. & Eng. Enc. Law (2d Ed.) 871; *Beck v. Pierce*, L. R. 23 Q. B. Div. 316; *Powers v. Southgate*, 15 Vt. 471, 40 Am. Dec. 691.

⁴⁰⁷ Consult the several statutes.

and then only to the extent of the value of the property so received.⁴⁰⁸ It is held, however, that the husband's common-law liability is not taken away by implication by statutes securing to the wife the right to her property.⁴⁰⁹

§ 113. On the wife's postnuptial contracts—In general.

At common law, as we have seen, a married woman cannot make a valid contract. Contracts made by her, with such exceptions as have already been discussed, are absolutely void, and are not binding either upon her or upon her husband. Under modern statutes removing the wife's common-law disability, her contracts are valid and bind her.⁴¹⁰ They are not, of course, binding upon the husband, for they are not his contracts.

§ 114. Same—Contracts made by wife as husband's agent.

A married woman, either at common law or under the statutes, may bind her husband by a contract made by her as his agent. The principles governing the wife's agency for her husband have been considered in a previous section. In general, the wife may bind her husband by such contracts, and by those only, as he has authorized her, either expressly or by implication, to make for him, or as have been ratified by him, if made without previous authority. As in the case of any other agent, the wife's power to bind her husband as

⁴⁰⁸ *Clark v. Miller*, 88 Ky. 108, 10 S. W. 277.

⁴⁰⁹ *Kies v. Young*, 64 Ark. 381, 42 S. W. 669, 62 Am. St. Rep. 199; *Connor v. Berry*, 46 Ill. 370, 95 Am. Dec. 417. See, contra, *Biery v. Ziegler*, 93 Pa. 367, 39 Am. Rep. 756.

⁴¹⁰ See ante, § 83.

his agent is determined entirely by the extent of her authority from him.⁴¹¹

In addition to what has already been said on the subject of the wife's implied authority to bind her husband by contracts made by her, it should be noted that the presumption, arising from the fact of cohabitation or a previous course of dealing, that the wife has authority to bind her husband, may be destroyed by the husband's giving express notice to third persons not to extend credit to the wife on his account. If, after receiving such notice, a third person sells goods to the wife upon the husband's credit, the husband is not liable,⁴¹² unless such goods were necessities which he has

⁴¹¹ See ante, § 99; 15 Am. & Eng. Enc. Law (2d Ed.) 871-875.

⁴¹² *Etherington v. Parrot*, 1 Salk. 418, 2 Ld. Raym. 1006; *Keller v. Phillips*, 39 N. Y. 351; *Segelbaum v. Ensminger*, 117 Pa. 248, 10 Atl. 759, 2 Am. St. Rep. 662. See, also, *Smith v. Smith*, 73 Mich. 445, 41 N. W. 499, 16 Am. St. Rep. 594.

In *Keller v. Phillips*, 39 N. Y. 351, in holding that a husband was not liable for goods sold to his wife after express notice to the plaintiff not to credit her, the court, by Woodruff, J., said:

"The rules of law relating to the power of the wife to bind her husband to payment for goods purchased by her for the use of herself and the family, are well settled. The husband is bound to provide for her and them whatever is necessary for their suitable clothing and maintenance, according to his and their station and condition in life, and, ordinarily, he will be presumed to assent to her making such purchases as, in the conduct of the domestic concerns, are proper for her management and supervision; but he is at liberty to withhold such assent, and destroy such presumption, by an express prohibition, and, if he does so, no one, having notice thereof, may trust the wife in reliance upon his credit, unless the husband so neglects his own duty that supplies become absolutely necessary according to their condition.

"In the present case, therefore, the sale of the goods being proved, or not being denied by the defendant, the burden of proof was upon the defendant to show that the credit was given against his ex-

failed to supply,⁴¹³ or unless, notwithstanding his prohibition, he ratifies the wife's contract and agrees to pay for the goods. In such case the mere fact that the husband permits his wife to retain the goods, and does not return them to the tradesman, or even give notice to the tradesman to come for them, does not amount to a ratification.⁴¹⁴

press dissent, and notice thereof to the plaintiffs. This being proved, the burden was upon the plaintiffs to show that the defendant did not suitably provide for his family according to his and their condition. Of that the plaintiffs were not to be the judges, except at the risk of establishing it by proof, and of that they offered no testimony whatever, but on the trial objected to the defendant's proving affirmatively that he did so, and the justice excluded evidence offered by him tending to show in what mode, and in part to what extent, that provision was made. The defendant was not bound to show affirmatively that he did so provide, and yet, so far as he appears to have been permitted, his testimony went to show that he did make suitable provision.

"Nor is it enough that the articles sold are, in their nature and description, necessary and suitable for the use of the wife and family. If they were not so, there would be no presumption of the husband's assent to the purchase in any case. It is indispensable, where the vendor has been forbidden to sell upon the wife's request, on the husband's credit, that the vendor show, not only that the goods were in their nature suitable and necessary, but that the husband neglected his duty to provide supplies, and that, for that reason, they were necessary.

"These rules are elementary. Modern legislation, in preserving to the wife all her own property, has taken away some of the grounds upon which the duty of the husband was placed by the common law, but it has not yet gone so far as to invest the wife with a discretion which the husband cannot control, and enable her to spend his property or involve him in debt against his will."

⁴¹³ Notice by a husband to a tradesman not to sell goods to his wife on his credit will not relieve the husband from liability for necessities so furnished, where the husband has not himself supplied his wife's wants. *McGrath v. Donnelly*, 131 Pa. 549, 20 Atl. 382. See, also, post, §§ 115, 123.

⁴¹⁴ *Segelbaum v. Enslinger*, 117 Pa. 248, 10 Atl. 759, 2 Am. St.

§ 115. Same—Wife's contracts for necessities—In general.

The power of a wife to bind her husband for contracts made by her as his agent is limited only by the extent of the authority conferred upon her by him; it is not confined to contracts for necessities.⁴¹⁵ But while contracts not for necessities bind the husband only when authorized or ratified by him, this is not always true

Rep. 662. In so holding the court said: "It is difficult to understand how there could be ratification in the face of such notices as were given in evidence, from mere acquiescence on the part of the defendant [the husband],—that is, simply permitting the goods to remain in the house; and there certainly was no evidence of express ratification. But we do not understand that there is any duty to return the goods resting upon the defendant when they were sold after express notice not to sell them, nor to notify the plaintiff that he may remove them, in order to relieve the defendant from liability. After notice not to sell, the plaintiff sold to the wife at his peril. He could not charge the husband as his debtor for goods sold to the wife simply because he delivered the goods to the wife. A silent acquiescence by the husband in such a delivery was no acquiescence in a delivery to himself. If the seller chose to take his chance of recovering from the husband by a delivery to the wife after notice not to deliver to her, he had a right to take such a chance, but he could not improve it into a right of action against the husband simply because the husband was an indifferent spectator. No duty whatever was imposed upon him by such a delivery. He was not bound to remain out of his house in order to prevent an implication of ratification arising from the user of the articles by the mere occupancy of his own home. [The articles were carpets and house furnishings.] Nor was he in any manner bound to abstain from the use of articles thus voluntarily placed in his house by the plaintiff against his own will. He was subject to no duty to the plaintiff in such circumstances, and hence cannot be held responsible as for the breach of a duty."

But where the husband is present when the purchase is made, and by his conduct assents to it, he will be liable, notwithstanding a previous notice to the merchant not to trust the wife. *Kriegler v. Smith*, 13 Mont. 235, 33 Pac. 937.

⁴¹⁵ See ante, § 99.

in the case of contracts for necessities. These contracts stand upon a peculiar footing and call for careful consideration, the subject being of great importance.⁴¹⁶

It is well settled that, even without any authority from her husband, either express or implied, a wife may bind her husband in certain circumstances by contracts for necessities for herself and children. For the purpose of obtaining such necessities, where the husband has neglected or refused to supply them, she is authorized by law to pledge his credit. This power grows out of his duty to support her. In thus supplying her wants the wife acts in some respects as her husband's agent, but her authority comes rather from the law, which obliges the husband to support his wife, than from him.⁴¹⁷ And he may be bound, even though he has expressly forbidden her to contract for him. The law invests her with an agency of necessity when the husband fails, without excuse, to provide for her.⁴¹⁸

⁴¹⁶ For monographic notes on the liability of husband or wife for necessities supplied to the wife, see 98 Am. St. Rep. 627, and 65 L. R. A. 529. See, also, note in 10 Am. Dec. 462.

⁴¹⁷ *Hanover v. Turner*, 14 Mass. 227, 7 Am. Dec. 203; *Cunningham v. Reardon*, 98 Mass. 538, 96 Am. Dec. 670; *Raynes v. Bennett*, 114 Mass. 424; *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362; *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120; *Ray v. Adden*, 50 N. H. 82, 9 Am. Rep. 175.

⁴¹⁸ *Schouler*, Dom. Rel. § 65.

In *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362, *Mitchell, J.*, said: "The wife has, by virtue of the marriage relation alone, no authority to bind her husband by contracts of a general nature. She may, however, be his agent, and, as such, bind him. This agency is frequently spoken of as being of two kinds: (1) That which the law creates as the result of the marriage relation, by virtue of which the wife is authorized to pledge the husband's credit for the purpose of obtaining those necessities

Her authority in such case may be termed "constructive authority."

But in order for the wife to have this extraordinary authority to bind her husband, two circumstances must concur:

(1) *The contract must be for necessities.*⁴¹⁹ What constitute necessities will be considered in the next section.⁴²⁰

(2) *The husband must have failed to provide for the wife himself.* In other words, he must be in default. In general, the husband has a right to determine what things shall be provided, and where they shall be procured; and when he has supplied the wife's needs sufficiently, though perhaps not generously nor in proportion to his ability, the wife cannot bind him, without his consent, for further supplies procured from third persons on his credit.⁴²¹

which the husband himself has neglected or refused to furnish. (2) That which arises from the authority of the husband, expressly or impliedly conferred, as in other cases. The first of these, sometimes called an 'agency in law' or an 'agency of necessity' is not, accurately speaking, referable to the law of agency, for the liability of the husband in such cases is not at all dependent upon any authority conferred by him. He would, under such circumstances, be liable, although the necessities were furnished to the wife against his express orders. The real foundation of the husband's liability in such cases is the clear legal duty of every husband to support his wife and supply her with necessities suitable to her situation and his own circumstances and condition in life."

⁴¹⁹ *Montague v. Benedict*, 3 Barn. & C. 631, 10 E. C. L. 205; *Clark v. Cox*, 32 Mich. 204.

⁴²⁰ See post, § 116.

⁴²¹ *Clark v. Cox*, 32 Mich. 204; *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362; *Mott v. Comstock*, 8 Wend. (N. Y.) 544; *Kimball v. Keyes*, 11 Wend. (N. Y.) 33.

The burden of proving both that the articles furnished or services rendered were necessities, and that the husband was in default, rests upon the party seeking to hold the husband liable.⁴²²

§ 116. Same—What are necessities.

We have seen that in certain cases the husband can be held liable for supplies furnished or services rendered to the wife on his credit only when such supplies or services are what the law terms "necessaries." It is therefore a matter of importance to determine what is meant by this term. Generally speaking, necessities are such food, clothing, medicine, or medical attendance, lodging, furniture, and the like, as the husband, considering his ability and social position, ought to furnish for the comfort, health, and support of his wife and children. The meaning of the term is not confined to articles of food, clothing, etc., required to sustain life or preserve decency, but includes also such articles of utility, or even ornament, as are suitable to maintain the wife according to the estate and rank of her husband. Whether a particular article or service is a necessary depends very largely upon the means and social condition of the husband, and hence it is plain that the same article or service may be a necessary in one case and not in another. In other words, the meaning of the term is largely relative, and depends to a great extent upon the circumstances of each particular case.

⁴²² *Cunningham v. Reardon*, 98 Mass. 538; *Eames v. Sweetser*, 101 Mass. 78; *Raynes v. Bennett*, 114 Mass. 424; *Keller v. Phillips*, 39 N. Y. 351.

A decision, therefore, in one case, that a particular article was a necessary, will often be of very little value as authority in a subsequent case, in which the facts and circumstances are different.⁴²³

The question whether the articles furnished the wife are necessities or not is often one of some difficulty. In some cases it is undoubtedly the duty of the court to rule, as a matter of law, that certain articles are not necessities for which a wife may pledge her husband's credit without his consent; but, except in very clear cases, the question is one of fact to be submitted to the jury.⁴²⁴

In determining what are necessities in a particular case, it is proper to take into account the extent of the defendant's estate, his income or ability to earn

⁴²³ See, generally, 15 Am. & Eng. Enc. Law (2d Ed.) 876; *Raynes v. Bennett*, 114 Mass. 424; *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362; *Cunningham v. Irwin*, 7 Serg. & R. (Pa.) 247, 10 Am. Dec. 458; note in 10 Am. Dec. 462.

Watches, jewelry, and other articles of personal adornment may be necessities if appropriate to the husband's means and social position (*Raynes v. Bennett*, 114 Mass. 424); but not when beyond his means or already provided (*Montague v. Benedict*, 3 Barn. & C. 631, 10 E. C. L. 205). A set of false teeth (*Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713), medical attendance (*Carstens v. Hanselman*, 61 Mich. 426, 28 N. W. 159, 1 Am. St. Rep. 606), or the services of a seamstress in family sewing (*Flynn v. Messenger*, 28 Minn. 208, 9 N. W. 759, 41 Am. Rep. 279), may be necessities. A church pew has been held to be not a necessary. *St. John's Parish v. Bronson*, 40 Conn. 75, 16 Am. Rep. 17. The wife's funeral expenses are necessities, for which the husband may be held liable. *Cunningham v. Reardon*, 98 Mass. 538, 96 Am. Dec. 670; *In re Stewart* (N. J. Eq.) 22 Atl. 122. The services of counsel may be necessities in some cases. 15 Am. & Eng. Enc. Law (2d Ed.) 877.

⁴²⁴ *Raynes v. Bennett*, 114 Mass. 424; *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362.

money, the manner in which he has been living, the mode of living and scale of expenditure of others in the social circle in which he moves, and other like circumstances.⁴²⁵

The burden of proving that the articles were necessities rests upon the party seeking to hold the husband liable.⁴²⁶

It is obvious from what has already been said as to the meaning of the term "necessaries" that illustrative examples, except of the general character already given, would be of little value. One case, however, calls for particular notice. Loans or advances of money are not necessities, even though used in paying for necessities, and a person lending money to a married woman cannot recover therefor from the husband unless he requested or assented to the loan.⁴²⁷ At the same time, however, it has been held that where the money is actually expended for such necessities as the husband could have been required to pay for, a court of equity will put the person lending or advancing the money in the place of the person who supplied the necessities, according to the doctrine of subrogation, and allow him to recover of the husband the amount so expended.⁴²⁸

⁴²⁵ *Raynes v. Bennett*, 114 Mass. 424; *Clark v. Cox*, 32 Mich. 204.

⁴²⁶ *Phillipson v. Hayter*, L. R. 6 C. P. 38.

⁴²⁷ *Skinner v. Tirrell*, 159 Mass. 474, 34 N. E. 692, 38 Am. St. Rep. 447, 21 L. R. A. 673, *Woodruff Cas.* 79; *Walker v. Simpson*, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73; *Marshall v. Perkins*, 20 R. I. 34, 37 Atl. 301, 78 Am. St. Rep. 841.

⁴²⁸ *Kenyon v. Farris*, 47 Conn. 510, 36 Am. Rep. 86; *Walker v. Simpson*, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216. But see, contra, *Skinner v. Tirrell*, 159 Mass. 474, 34 N. E. 692, 38 Am. St. Rep. 447, 21 L. R. A. 673, *Woodruff Cas.* 79.

It should be carefully noted that, even though an article purchased by the wife, or service engaged by her, may, when considered with reference to the estate and rank of the husband, fall within the class known as "necessaries," for example, food, decent clothing, or medical attendance, it must further appear that the article or service was in fact necessary in the particular case. A wife has no implied or constructive authority to pledge her husband's credit even for articles appropriate for her support and comfort if he has already supplied her wants himself.⁴²⁹

§ 117. Same—Credit not given to husband.

A husband is not bound for necessities furnished to his wife, not on his credit, but on the credit of the wife herself,⁴³⁰ or of a third person.⁴³¹ This is for the obvious reason that, where the credit is given to the husband, the contract is made with him through the agency of the wife, and he is therefore bound, for it is his own contract; but where the credit is given to the wife or

⁴²⁹ *Clark v. Cox*, 32 Mich. 204. See ante, §§ 99, 115.

⁴³⁰ *Bentley v. Griffin*, 5 Taunt. 356, 1 E. C. L. 131; *Gafford v. Dunham*, 111 Ala. 551, 20 So. 346, *Woodruff Cas.* 75; *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421. See, also, *Mackinley v. McGregor*, 3 Whart. (Pa.) 369, 31 Am. Dec. 522.

The fact that the wife, by reason of coverture, is not liable on the contract for necessities, does not render the husband liable where the credit was given to the wife. *Gafford v. Dunham*, 111 Ala. 551, 20 So. 346, *Woodruff Cas.* 75.

A husband is not liable for goods purchased by his wife on her own credit for use in her separate business, in which she is engaged without his assent. *Tuttle v. Hoag*, 46 Mo. 38, 2 Am. Rep. 481.

⁴³¹ 15 Am. & Eng. Enc. Law (2d Ed.) 892.

to a third person, the contract is the contract of the wife or of such third person, and not that of the husband, and he is therefore not bound by it.

Whether the necessities were furnished on the credit of the wife or of her husband is a question of fact to be determined by the jury.⁴³² And even if the credit was in fact extended to the wife personally, she cannot be held personally liable unless she has so agreed. Even under statutes conferring upon a married woman the power to make contracts binding herself personally, one who deals with a married woman living with her husband, knowing her to be married, is bound to presume that she is acting for her husband, if the contract is one which a married woman in charge of her husband's household may naturally and properly make in his behalf, and he cannot hold the wife liable unless she has expressly agreed to become so.⁴³³

⁴³² *Bentley v. Griffin*, 5 Taunt. 356, 1 E. C. L. 131; *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421.

⁴³³ *Baker v. Carter*, 83 Me. 132, 21 Atl. 834, 23 Am. St. Rep. 764; *Powers v. Russell*, 26 Mich. 179; *Flynn v. Messenger*, 28 Minn. 208, 9 N. W. 759, 41 Am. Rep. 279; *Moore v. Copley*, 165 Pa. 294, 30 Atl. 829, 44 Am. St. Rep. 664. In the case last cited the court said: "While the power of the husband over the separate estate of his wife has been taken away, his liability for her support and that of his children remains. He is, at least for the purpose of providing necessities, the head of his household, and he is liable for such necessities furnished to his wife and children, whether with or without his knowledge. His wife is not liable unless she expressly undertakes to become so. Her undertaking is never presumed, but must be shown affirmatively. The act of delivery of the goods to her, or the fact that the creditor has chosen to charge them to her, is not enough."

§ 118. Same—Wife living apart from husband—In general.

The principles stated in the preceding section apply with full force where the wife is living with her husband, and so has not forfeited her right of support. In such case, as we have seen, the wife's authority to bind her husband for necessities will ordinarily be presumed.⁴³⁴ Where the parties live apart, there is no such presumption.⁴³⁵ Whether she can bind him as his "agent of necessity" will depend upon the circumstances of the separation. If, notwithstanding the separation, the wife has not lost her right of support, she may pledge his credit for necessities which he has failed to furnish; but if the circumstances of the separation are such that the wife has forfeited her right of support, she has no such power. Several cases should be noted: (1) Where the separation is through the fault of the husband; (2) where the separation is through the fault of the wife; (3) where the separation is by mutual consent. We shall examine each case separately.

§ 119. Same—Separation through fault of husband.

Where the parties to the marriage live apart through the fault of the husband, the duty of the husband to support the wife is not affected by the fact of separation, and he is liable to third persons for necessities furnished to the wife on his credit. Thus, a husband who, by his cruelty or other misconduct, compels his wife to leave him, is considered by the law as giving her thereby a credit to procure necessities on his ac-

⁴³⁴ See ante, § 99.

⁴³⁵ See ante, § 99.

count, and is responsible to any person who may supply her wants on his credit.⁴³⁶ So, also, where the husband deserts the wife,⁴³⁷ or turns her away from home without just cause.⁴³⁸ It is immaterial in these cases that the husband has prohibited the extension of credit to his wife.⁴³⁹ And where a husband refuses, without good cause, to permit his wife to live with him, and makes no pecuniary allowance for her support, she may pledge his credit for her support, although he may have provided a suitable home for her with some third person. Not being permitted to live with her husband, the wife may make her own arrangements, and is not compelled to accept any other home he may provide.⁴⁴⁰

⁴³⁶ *Houlston v. Smyth*, 5 Bing. 127, 11 E. C. L. 64, 2 Car. & P. 22, 12 E. C. L. 9; *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421; *Billing v. Pilcher*, 7 B. Mon. (Ky.) 458, 46 Am. Dec. 523; *Cartwright v. Bate*, 1 Allen (Mass.) 514, 79 Am. Dec. 759; *Cunningham v. Rear-don*, 98 Mass. 538, 96 Am. Dec. 670.

⁴³⁷ *Casteel v. Casteel*, 8 Blackf. (Ind.) 240, 44 Am. Dec. 763; *Carstens v. Hanselman*, 61 Mich. 426, 28 N. W. 159, 1 Am. St. Rep. 606.

⁴³⁸ *Bolton v. Prentice*, 2 Strange, 1214; *Wilson v. Glossop*, L. R. 19 Q. B. Div. 379. In this case it was held that a husband who turned his wife out of doors after she had committed adultery with his connivance, was liable to one who thereafter supported her. The court said: "We can nowhere find any statement of what is a justifiable cause in point of law for turning a wife out of doors. According to the earlier authorities, adultery is not such a cause,"—quoting from *Robinson v. Gosnold*, 6 Mod. 631; *Manby v. Scott*, Bac. Abr. "Baron & Feme," (H); *Hunt v. De Blaquiére*, 5 Bing. 550. It would seem that, if adultery not connived at nor condoned by the husband is not a sufficient cause, there can be no such cause, and the husband's only recourse would be a divorce. See note 446.

⁴³⁹ *Bolton v. Prentice*, 2 Strange, 1214.

⁴⁴⁰ *Kirk v. Chinstrand*, 85 Minn. 108, 88 N. W. 422, 56 L. R. 333.

It has been held that, where a wife living apart from her husband through his fault and for justifiable cause, has means of her own adequate for her support, she cannot bind her husband for necessities.⁴⁴¹ It is submitted that this doctrine, at least where the question is unaffected by statute, is not sound, and in a recent case it has been expressly repudiated.⁴⁴² At common law the husband is liable for the support of his wife, whether she has property or not, and this rule has in most states not been changed by the statutes. The husband remains liable, notwithstanding the statutes preserving to the wife her own property.⁴⁴³ This right of support is unaffected by the fact that the parties are living apart, if the separation is through the fault of the husband; and if a wife having property of her own may pledge her husband's credit for her support while she is living with him, she may continue to do so after he causes a separation. The wife's earnings, however, probably stand upon a different footing from her income from property. Since the husband is entitled to the wife's services,⁴⁴⁴ her earnings may be applied to her support when they are living together. So, also, although, possibly, he may forfeit his absolute right to her services when he deserts her or drives her from home, it seems that, even after such separation, if she is capable of earning and does earn her own living, wholly or in

⁴⁴¹ *Hunt v. Hayes*, 64 Vt. 89, 23 Atl. 920, 33 Am. St. Rep. 917, 14 L. R. A. 661.

⁴⁴² *Ott v. Hentall*, 70 N. H. 231, 47 Atl. 80, 51 L. R. A. 226.

⁴⁴³ *Ott v. Hentall*, 70 N. H. 231, 47 Atl. 80, 51 L. R. A. 226.

⁴⁴⁴ See ante, § 65.

part, she cannot pledge his credit for necessities which she can supply by her own exertions. This would seem to follow from the fact that the husband's duty to support his wife and his right to her services are correlative.⁴⁴⁵

§ 120. Same—Separation through fault of wife.

If a wife leaves her husband without justification and without his consent, she forfeits her right to support, and the husband cannot be held liable even for necessities furnished to her, in the absence of an agreement by him to pay for them.⁴⁴⁶

In general, if a wife who has left her husband without justification, thereby forfeiting her right of support, re-

⁴⁴⁵ Thus, in *War v. Huntly*, 1 Salk. 118, it was held that the money earned by a deserted wife should be applied to her support. See, also, dictum of Pollock, C. B., in *Johnston v. Sumner*, 3 Hurl. & N. 261. These and other cases are reviewed in the Vermont case above cited, but the distinction between money earned by the wife and that coming to her from other sources does not seem to have been fully appreciated. See, also, *Cline v. Hackbarth*, 27 Tex. Civ. App. 391, 65 S. W. 1086. And see *Cunningham v. Irwin*, 7 Serg. & R. (Pa.) 247, 10 Am. Dec. 458.

⁴⁴⁶ Schouler, Dom. Rel. § 66; 15 Am. & Eng. Enc. Law (2d Ed.) 888; *Belknap v. Stewart*, 38 Neb. 304, 56 N. W. 881, 41 Am. St. Rep. 729; *Peaks v. Mayhew*, 94 Me. 571, 48 Atl. 172; *Vusler v. Cox*, 53 N. J. Law, 516, 22-Atl. 347, *Woodruff Cas.* 76; *McCutchen v. McGahay*, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; *Cline v. Hackbarth*, 27 Tex. Civ. App. 391, 65 S. W. 1086.

A husband is not liable for necessities furnished to his wife after he has left her, upon her giving him cause for divorce (*Sawyer v. Richards*, 65 N. H. 185, 23 Atl. 150); nor where she eloped with an adulterer (*Morris v. Martin*, 1 Strange, 647); nor where he has turned her away for her adultery (*Hunter v. Boucher*, 3 Pick. [Mass.] 289; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73); but if he connived at her adultery, and then turned her out, he is liable for her support (*Wilson v. Glossop*, L. R. 19 Q. B. Div. 379).

turns and is received back by him, his liability upon her subsequent contracts is to be determined by the ordinary rules applicable to the case of any other wife living with her husband. In such case the wife's right of support is revived.⁴⁴⁷ So, also, if the wife, in good faith, offers to return, but the husband refuses to receive her, his duty to support her revives, and he is liable for necessities thereafter furnished her, as in the case of any other wife separated from her husband through his fault. In such case, he is bound to receive her or be liable for her support as if he had done so.⁴⁴⁸ Moreover, in receiving her he cannot impose upon her any other conditions than her return and the faithful performance of her marital duties. If he imposes other conditions, which she rejects, as, for example, the surrender of some of her property to him, he is liable for her support, though she does not return.⁴⁴⁹ The husband's liability after the wife's offer to return does not extend to necessities furnished to her during her previous absence.⁴⁵⁰

⁴⁴⁷ See *Oinson v. Heritage*, 45 Ind. 73, 15 Am. Rep. 258.

⁴⁴⁸ *McCutchen v. McGahay*, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; *McGahay v. Williams*, 12 Johns. (N. Y.) 293; *Cunningham v. Irwin*, 7 Serg. & R. (Pa.) 247, 10 Am. Dec. 458.

⁴⁴⁹ *Reed v. Moore*, 5 Car. & P. 200, 24 E. C. L. 277. But where a wife, who had conducted herself lewdly while living with her husband, left him, though not for a lewd life, and later offered to return, whereupon the husband replied that if she came back she should not sit at his table nor govern his children, but should live in a garret, it was held that he was not thereafter liable for necessities furnished her, his refusal to receive her not being absolute, the court saying that she deserved no better usage. *Child v. Hardyman*, 2 Strange, 874.

⁴⁵⁰ *Oinson v. Heritage*, 45 Ind. 73, 15 Am. Rep. 258.

There is some injustice in requiring a husband who has been deserted by his wife to take her back, or to support her, whenever she may repent of her misconduct and return or offer to return to him, and it would seem that the rule ought to be applied with caution. It seems, moreover, that there is an exception to this rule where the wife elopes with one with whom she commits adultery, or commits adultery after leaving her husband, or is turned away by her husband because of her adultery. In none of these cases is he bound to receive her back, or liable for her support.⁴⁵¹ Nor is he liable where she has committed adultery while living apart from him, although she left him with his consent,⁴⁵² or was driven away from home by his misconduct.⁴⁵³

Ordinarily the fact that a tradesman furnishing the wife with necessities did not know of the fact and cause of the separation will not change the rule that the husband is not liable; the tradesman trusts the wife at his peril.⁴⁵⁴ But if a husband has held out his wife as his agent to a particular tradesman, he will be liable

⁴⁵¹ Schouler, Dom. Rel. § 66.

.. ⁴⁵² See post, § 122.

⁴⁵³ *Govier v. Hancock*, 6 Term R. 603. In this case the husband, after having committed adultery with a woman whom he brought to his home, treated his wife with great cruelty, and finally turned her out of doors, there being then no imputation on her conduct. She subsequently committed adultery, and then offered to return home, but her husband refused to receive her. It was held that he was not bound to receive or support her after her adultery.

⁴⁵⁴ *Vusler v. Cox*, 53 N. J. Law, 516, 22 Atl. 347, *Woodruff Cas.* 76; *McCutchen v. McGahay*, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; *Walker v. Simpson*, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73. See, also, *Hunter v. Boucher*, 3 Pick. (Mass.) 289.

to the latter for necessities furnished to the wife after she has, without cause, left her husband, where the tradesman had no knowledge or reason to know of the separation or of a revocation of the agency. This rests upon the general principle of agency that an agency once established is presumed to continue unless notice is given to the contrary.⁴⁵⁵

§ 121. Same—Separation by mutual consent.

Where a husband and wife separate and live apart by mutual consent, the husband is still legally bound to support the wife, and may therefore be held liable on her contracts for necessities when he has failed to discharge his duty by making suitable provision for her; but he is not liable unless he fails to supply her wants.⁴⁵⁶ If he has agreed to make his wife an allowance sufficient for her support, and regularly pays such allowance, she cannot bind him for necessities, for he is not in default;⁴⁵⁷ but if he fails to pay the agreed allowance, she may supply her wants on his credit.⁴⁵⁸ If the wife has means of her own sufficient for her support, and she and her husband separate by mutual consent, no

⁴⁵⁵ *Sibley v. Gilmer*, 124 N. C. 631, 32 S. E. 964; *Cowell v. Phillips*, 17 R. I. 188, 20 Atl. 933, 11 L. R. A. 182. See, also, *Smith v. Smith*, 73 Mich. 455, 41 N. W. 499, 16 Am. St. Rep. 594.

⁴⁵⁶ *Baker v. Barney*, 8 Johns. (N. Y.) 72, 5 Am. Dec. 326.

⁴⁵⁷ *Tod v. Stokes*, 12 Mod. 244; *Hodgkinson v. Fletcher*, 4 Camp. 70; *Reeve v. Conyngham*, 2 Car. & K. 444, 61 E. C. L. 444; *Johnston v. Sumner*, 3 Hurl. & N. 261; *Cany v. Patton*, 2 Ashm. (Pa.) 140.

The allowance made by the husband must be adequate for the wife's support, or she may pledge his credit for the deficiency. *Hodgkinson v. Fletcher*, 4 Camp. 70.

⁴⁵⁸ *Baker v. Barney*, 8 Johns. (N. Y.) 72, 5 Am. Dec. 326.

promise of an allowance being made by him, it is probable that she could not pledge his credit for necessities. In such case it would seem that she has voluntarily relinquished her right of support.⁴⁵⁹

Where husband and wife separate by consent, the wife accepting a provision inadequate for her support, and agreeing to support herself, and to make no claim upon him for support, the husband is not liable for necessities thereafter furnished to her, in the absence of an offer by her to return, or a request for support under his own roof. In such case the husband's consent to the wife's living apart is deemed a conditional consent, conditioned upon the performance by her of her agreement, and, upon her failure to perform, it cannot be said that she is living apart with his consent, unless, at least, she has offered to return to him, and the offer has been refused.⁴⁶⁰

§ 122. Same—Effect of wife's adultery while living apart.

A wife who, while living apart from her husband, commits adultery, thereby forfeits her right of support, and can no longer pledge her husband's credit, even for necessities.⁴⁶¹ This is the case, whether the separation

⁴⁵⁹ See *Johnston v. Sumner*, 3 Hurl. & N. 261.

⁴⁶⁰ *Biffin v. Bignell*, 7 Hurl. & N. 877; *Eastland v. Burchell*, L. R. 3 Q. B. Div. 432; *Alley v. Winn*, 134 Mass. 77, 45 Am. Rep. 297.

⁴⁶¹ *Manwaring v. Sands*, 2 Strange, 706; *Cooper v. Lloyd*, 6 C. B. (N. S.) 519; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73.

A husband is not liable for necessities furnished to his wife after she has eloped with a paramour, although the person supplying the necessities had no notice of the facts. *Morris v. Martin*, 1 Strange, 647.

was by mutual consent,⁴⁶² or through the fault of the husband.⁴⁶³ And it is immaterial whether the person supplying her with necessaries knew of the adultery or not, for he supplies them at his own peril.⁴⁶⁴

§ 123. Same—Necessity and effect of notice not to credit wife.

As a general rule, a person who supplies a married woman, whether living with or apart from her husband, with necessaries on her husband's credit, does so at his peril. He is bound to make inquiries and inform himself as to whether or not the circumstances of the case are such as to authorize the wife so to pledge her husband's credit. It is not ordinarily the duty of the husband to notify third persons not to trust his wife on his account.⁴⁶⁵ Where, however, the husband has held

⁴⁶² See *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73.

⁴⁶³ *Govier v. Hancock*, 6 Term R. 603.

Where a wife leaves her husband for the purpose of forming or continuing an adulterous intimacy with a man to whose home she goes to reside, her paramour cannot recover from the husband for her support, even though she was compelled to leave home by the husband's cruelty. *Almy v. Wilcox*, 110 Mass. 443.

⁴⁶⁴ *Manwaring v. Sands*, 2 Strange, 706; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73.

But where the husband, upon discovering his wife's adultery, left her and his children in his home, where she continued her adulterous connection, it was held that the husband was liable for necessaries thereafter furnished by a tradesman who had no notice of the circumstances. *Norton v. Fazan*, 1 Bos. & P. 226.

⁴⁶⁵ See ante, §§ 99, 120. Where husband and wife separate by agreement, the husband making an allowance to the wife, notice to tradesmen of such agreement and allowance is not necessary, at least where they have had no previous dealings with the wife. *Reeve v. Conyngham*, 2 Car. & K. 444, 61 E. C. L. 444; *Cany v. Patton*, 2 Ashm. (Pa.) 140.

his wife out to third persons as his agent, as, for example, by permitting her to trade with them upon his credit, he must give notice to such persons of a withdrawal of her authority, in order to avoid liability for her contracts on his behalf made within the scope of her authority as previously established. In such case her authority is presumed to continue until notice to the contrary.⁴⁶⁶ Third persons who furnish supplies to a wife on her husband's credit after notice from him not to do so cannot recover therefor from him, unless such supplies are necessities which he has failed to furnish. In the latter case, of course, he cannot escape liability by giving such notice.⁴⁶⁷

§ 124. Same—Effect of divorce proceedings or decree.

The mere fact that divorce proceedings are pending between husband and wife does not relieve the husband of the duty to support his wife, and his liability for necessities supplied to her on his account. Until divorced she is still his wife, and unless she has in some way forfeited her right to support, he is still bound to support her, although a suit for divorce may have been begun.⁴⁶⁸ If, however, in a suit brought by the wife,

⁴⁶⁶ *Sibley v. Gilmer*, 124 N. C. 631, 32 S. E. 964; *Cowell v. Phillips*, 17 R. I. 188, 20 Atl. 933, 11 L. R. A. 182. See ante, § 99, note 306.

⁴⁶⁷ *Mott v. Comstock*, 8 Wend. (N. Y.) 544; *Kimball v. Keyes*, 11 Wend. (N. Y.) 33; *Keller v. Phillips*, 39 N. Y. 351; *Daubney v. Hughes*, 60 N. Y. 187; *McGrath v. Donnelly*, 131 Pa. 549, 20 Atl. 382; *Woodward v. Barnes*, 43 Vt. 330. See ante, § 114.

⁴⁶⁸ *Hancock v. Merrick*, 10 Cush. (Mass.) 41; *Cunningham v. Irwin*, 7 Serg. & R. (Pa.) 247, 10 Am. Dec. 458. As to the husband's liability for counsel fees for services rendered the wife in the divorce proceedings, see 15 Am. & Eng. Enc. Law (2d Ed.) 878.

the husband has been ordered by the court to pay alimony to the wife for her support during the litigation, he cannot be held liable for necessities subsequently furnished by third persons unless he has been in default in making the payments fixed by the court.⁴⁶⁹ But a decree for the payment of alimony, whether *pendente lite* or permanent, rendered after the necessities were furnished, is no defense to an action for such necessities, although the decree is for alimony for past as well as for future support.⁴⁷⁰ And the failure of the husband to pay the decreed alimony will render him liable for necessities thereafter furnished.⁴⁷¹

Where the marriage has been dissolved by a final decree of divorce *a vinculo matrimonii*, the former husband is, of course, not liable for necessities thereafter furnished to the woman who has ceased to be his wife; and in such case the decree is notice to the world of the fact of divorce.⁴⁷²

⁴⁶⁹ Willson v. Smyth, 1 Barn. & Adol. 801, 20 E. C. L. 486; Crittenden v. Schermerhorn, 39 Mich. 661, 33 Am. Rep. 440; Bennett v. O'Fallon, 2 Mo. 69, 22 Am. Dec. 440; Hare v. Gibson, 32 Ohio St. 33, 30 Am. Rep. 568.

The fact that the plaintiff, dealing with the wife, did not know of the allowance and payment of the alimony, is immaterial; he trusts her at his peril. Hare v. Gibson, 32 Ohio St. 33, 30 Am. Rep. 568.

The sufficiency of the allowance fixed by the court cannot be collaterally drawn in question in a suit for necessities; the wife alone is entitled to complain. Hare v. Gibson, 32 Ohio St. 33, 30 Am. Rep. 568.

⁴⁷⁰ Keegan v. Smith, 5 Barn. & C. 375; Mitchell v. Treanor, 11 Ga. 324, 56 Am. Dec. 421; Dowe v. Smith, 11 Allen (Mass.) 107.

⁴⁷¹ Hunt v. De Blaquiere, 5 Bing. 550, 15 E. C. L. 535.

⁴⁷² Since the public is charged with notice of judicial proceedings.

§ 125. Liability of supposed husband for supplies furnished to woman passing as wife.

The distinction between the liability of a husband for his wife's contracts made by her as his agent and for those made under authority of law to enforce her legal right of support is well brought out when it is attempted to apply the rules just considered to the case of contracts made by a mistress. Where a man lives with a woman to whom he is not married, and holds her out as his wife, he is *prima facie* liable for supplies, etc., furnished to her on his credit, on the ground, as in the case of a wife, that she has implied authority so to bind him;⁴⁷³ and it is immaterial in such case that the person giving credit knew that the parties were not married.⁴⁷⁴ The liability of the man here grows out of the fact that she is his agent; but if he discards her, and the parties separate, the man cannot be held liable for necessities thereafter furnished to the woman unless he has authorized the purchase. Unlike a wife living apart from her husband, the discarded mistress, however needy she may be, is not authorized by law to pledge the man's credit for necessities, for a man is under no legal duty to support his mistress.⁴⁷⁵

§ 126. Liability for wife's torts.

At common law a husband is liable for his wife's torts,

⁴⁷³ Robinson v. Nahon, 1 Camp. 245; 15 Am. & Eng. Enc. Law (2d Ed.) 881.

⁴⁷⁴ Watson v. Threkeld, 2 Esp. 637. See Ryan v. Sams, 12 Q. B. (N. S.) 460, 64 E. C. L. 460.

⁴⁷⁵ Munro v. De Chemant, 4 Camp. 215. See, also, Blades v. Free, 9 Barn. & C. 167, 17 E. C. L. 351; Ryan v. Sams, 12 Q. B. (N. S.) 460, 64 E. C. L. 460.

whether committed before or during coverture.⁴⁷⁶ For her antenuptial torts he is liable, just as he is liable for any of her antenuptial debts.⁴⁷⁷

For her postnuptial torts, committed in his absence, and without his order, the husband is liable, not because the wife's act is imputed to him, but by reason of the coverture, which renders the wife incapable of being sued alone,⁴⁷⁸ but as the wife is the real offender, she

⁴⁷⁶ See, generally, as to the liability for the wife's torts, Schouler, Dom. Rel. §§ 75, 76; 15 Am. & Eng. Enc. Law (2d Ed.) 894-897; notes in 6 Am. Dec. 106, 83 Am. Dec. 776, and 2 Am. St. Rep. 579; monographic note in 92 Am. St. Rep. 164.

As to the liability of a married woman for the use and safety of premises owned by her, see note in 23 L. R. A. 622.

There is some injustice in the law that makes the husband liable for his wife's torts without giving him the power to restrain or chastise her. A wife so disposed might ruin her husband by exposing him to actions for slander and other torts, without his having the power to prevent or punish her, and it has even been held that the husband's efforts to prevent the circulation of a slander uttered by his wife could not be proved, even in mitigation of damages, in an action against him. See 1 Bishop, Mar. Women, §§ 907, 909.

⁴⁷⁷ Hubble v. Fogartie, 3 Rich. Law (S. C.) 413, 45 Am. Dec. 775.

⁴⁷⁸ Henley v. Wilson, 137 Cal. 273, 70 Pac. 21, 92 Am. St. Rep. 169; Heckle v. Lurvey, 101 Mass. 344, 3 Am. Rep. 366; Morgan v. Kennedy, 62 Minn. 348, 64 N. W. 912, 54 Am. St. Rep. 647, 30 L. R. A. 521.

For torts committed by the wife, not in the presence of her husband, and not by his coercion, they are jointly liable, and must be joined in the action. If there is a recovery, the judgment is against both, and if the wife has separate property, it may be taken in execution. Smith v. Taylor, 11 Ga. 22; Merrill v. St. Louis, 83 Mo. 244, 53 Am. Rep. 576; Gill v. State, 39 W. Va. 479, 20 S. E. 568, 45 Am. St. Rep. 928.

Husband and wife are jointly liable for her torts committed during coverture. Ball v. Bennett, 21 Ind. 427, 83 Am. Dec. 356; Shaw v. Hallihan, 46 Vt. 389, 14 Am. Rep. 628. Thus, they may be sued jointly for a slander uttered by the wife. Baker v. Young, 44 Ill.

is personally liable, and must be joined in the suit as co-defendant with her husband.⁴⁷⁹ The same rule applies to torts committed by the wife in his presence, but not by his direction nor under his coercion.⁴⁸⁰ If the tort is committed under the coercion of the husband, or perhaps by his order, whether in his presence or not, he alone is liable, and should be sued alone. In such case the wife's act is imputed to him.⁴⁸¹ The fact that the tort was committed in his presence raises a presumption in favor of the wife of coercion by the husband, but this presumption may be rebutted.⁴⁸²

42, 92 Am. Dec. 149; *Morgan v. Kennedy*, 62 Minn. 348, 64 N. W. 912, 54 Am. St. Rep. 647, 30 L. R. A. 521; note in 30 L. R. A. 521.

A judgment against a married woman sued without her husband for her tort is voidable merely, and not void. *Smith v. Borden*, 17 R. I. 220, 21 Atl. 351, 11 L. R. A. 585. But see note to this case in report last cited.

⁴⁷⁹ See cases cited in notes immediately preceding and following.

⁴⁸⁰ A married woman is personally liable for a tort committed by her, unless her husband was both present and directed the doing of the tort at the time. His presence raises a presumption of his direction, but this is not conclusive, and may be rebutted. *Brazil v. Moran*, 8 Minn. 236, 83 Am. Dec. 772; *Wheeler & W. Mfg. Co. v. Heil*, 115 Pa. 487, 8 Atl. 616, 2 Am. St. Rep. 575; *Appeal of Franklin's Adm'r*, 115 Pa. 534, 6 Atl. 70, 2 Am. St. Rep. 583.

⁴⁸¹ In *McKeown v. Johnson*, 1 McCord (S. C.) 578, 10 Am. Dec. 698, it was held that, if the tort was committed by the wife in the husband's presence, although against his will, he alone is liable. This seems to be an extreme holding. In *Handy v. Foley*, 121 Mass. 259, 23 Am. Rep. 270, it was held that husband and wife are jointly liable for a tort committed by her in his absence, but by his direction. In this case the court said: "The statement in 2 Kent, Comm. 149, that, if the wife commits a tort 'in his company or by his order,' he alone is liable, is too general, and must be limited to the case of her acting by his coercion."

⁴⁸² *Brazil v. Moran*, 8 Minn. 236, 83 Am. Dec. 772; *Cassin v. Delany*, 38 N. Y. 178; *Wheeler & W. Mfg. Co. v. Heil*, 115 Pa. 487, 8

For their joint torts ordinarily the husband alone is liable, the wife being presumed to act under his coercion, but if the presumption of coercion be rebutted, they are both liable as joint tortfeasors.⁴⁸³

The husband is liable jointly with the wife, not only for her ordinary torts, but also for torts committed by her in a fiduciary capacity before or after marriage, such as a breach of trust by the wife acting as trustee, guardian, executrix, or other fiduciary.⁴⁸⁴ But since the contracts of a married woman are void, and so cannot be made the basis of any liability, the husband cannot be held liable for the wife's torts or frauds based upon her contract, where the contract is the substantial basis of the liability.⁴⁸⁵ It seems, however, that if the substan-

Atl. 616, 2 Am. St. Rep. 575; Appeal of Franklin's Adm'r, 115 Pa. 534, 6 Atl. 70, 2 Am. St. Rep. 583.

⁴⁸³ Handy v. Foley, 121 Mass. 259, 23 Am. Rep. 270; *Flesh v. Lindsay*, 115 Mo. 1, 21 S. W. 907, 37 Am. St. Rep. 374; *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66; *Edwards v. Wessinger*, 65 S. C. 161, 43 S. E. 518, 95 Am. St. Rep. 789; *Crawford v. Doggett*, 82 Tex. 139, 17 S. W. 929, 27 Am. St. Rep. 859; *Roadcap v. Sipe*, 6 Grat. (Va.) 213. See, also, *Cushing v. Hederman*, 117 Iowa, 637, 91 N. W. 940, 94 Am. St. Rep. 320.

⁴⁸⁴ 15 Am. & Eng. Enc. Law (2d Ed.) 896; *Hubble v. Fogartie*, 3 Rich. Law (S. C.) 413, 45 Am. Dec. 775.

⁴⁸⁵ *Schouler*, Dom. Rel. § 76; *Keen v. Hartman*, 48 Pa. 497, 88 Am. Dec. 472. No action will lie against husband and wife jointly for her tort in falsely and fraudulently representing to the plaintiff that she and her children were in destitute circumstances, whereby plaintiff was induced to sell her supplies on credit. *Woodward v. Barnes*, 46 Vt. 332, 14 Am. Rep. 626.

A married woman, unable to contract, cannot be held liable in tort for her frauds connected with her contract. *Prentiss v. Paisley*, 25 Fla. 927, 7 So. 56, 7 L. R. A. 640. So, also, where a married woman is unable to contract, and hence unable to employ a servant, she cannot be held liable for the negligence of a servant employed

tial ground of liability is a tort, although connected with a contract, the husband may be held liable.

The husband's liability for his wife's torts, both antenuptial and postnuptial, except torts committed by his direction or under his coercion, for which he is solely liable, continues only during coverture, and the dissolution of the marriage by the death of the husband⁴⁸⁶ or of the wife,⁴⁸⁷ or by a divorce,⁴⁸⁸ before the recovery of a judgment against him, terminates his liability. But the wife's personal liability for her torts, which during coverture could be enforced only in an action against husband and wife jointly, if not so enforced, may be enforced against her after the husband's death, if she survives.⁴⁸⁹

Modern statutes have, in some states, expressly relieved the husband from liability for his wife's torts,⁴⁹⁰ except such as may properly be imputed to him because done by his direction or under his coercion.⁴⁹¹ There is some conflict as to whether he is so relieved by implica-

by her. *Ferguson v. Neilson*, 17 R. I. 81, 20 Atl. 229, 33 Am. St. Rep. 855.

⁴⁸⁶ Schouler, Dom. Rel. § 75.

⁴⁸⁷ Schouler, Dom. Rel. § 75.

⁴⁸⁸ *Capel v. Powell*, 17 C. B. (N. S.) 743, 112 E. C. L. 743.

⁴⁸⁹ Schouler, Dom. Rel. § 75; 1 Bishop, Mar. Women, §§ 842, 908. A suit against husband and wife jointly for their joint tort does not abate upon the death of the husband before judgment, but may be prosecuted against the wife alone. *Baker v. Braslin*, 16 R. I. 635, 18 Atl. 1039, 6 L. R. A. 718.

⁴⁹⁰ See *Strouse v. Leipf*, 101 Ala. 433, 14 So. 667, 46 Am. St. Rep. 122, 23 L. R. A. 622; *Austin v. Cox*, 118 Mass. 58; *Ricci v. Mueller*, 41 Mich. 214, 2 N. W. 23.

⁴⁹¹ See *Strouse v. Leipf*, 101 Ala. 433, 14 So. 667, 46 Am. St. Rep. 122, 23 L. R. A. 622; *Ricci v. Mueller*, 41 Mich. 214, 2 N. W. 23.

tion by the statutes which secure to the wife her own property, and enable her to sue and be sued as if sole. It would seem that, since these statutes have removed the substantial reasons for the husband's liability at common law, his liability ought not longer to exist, and it is so held in some states.⁴⁹² In other states, however, it is held that, since these enlarging statutes are in derogation of the common law, they should be strictly construed, and that neither the wife's disability to be sued in tort, nor the husband's liability for the wife's torts, can be affected by implication, and remain as before, except where it is expressly provided to the contrary.⁴⁹³

VII. CRIMINAL LIABILITY OF HUSBAND AND WIFE.

§ 127. In general.

Coverture does not render a woman incapable of committing crime, but she is not punishable for crimes committed under the coercion of her husband. Where the crime is committed in his actual presence, or under his immediate control or influence, it will be presumed that she acted under his coercion. But for crimes committed in his absence, and not under his immediate influence, the wife is punishable, and the fact that she acted under his command is no defense.

⁴⁹² *Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 578; *Norris v. Corkill*, 32 Kan. 409, 49 Am. Rep. 489; *Lane v. Bryant*, 100 Ky. 138, 37 S. W. 584, 36 L. R. A. 709; *Culmer v. Wilson*, 13 Utah, 129, 44 Pac. 833, 57 Am. St. Rep. 713.

⁴⁹³ *Henley v. Wilson*, 137 Cal. 273, 70 Pac. 21, 58 L. R. A. 941, 92 Am. St. Rep. 160; *Morgan v. Kennedy*, 62 Minn. 348, 64 N. W. 912, 54 Am. St. Rep. 647, 30 L. R. A. 521; *Gill v. State*, 39 W. V. 479, 20 S. E. 568, 45 Am. St. Rep. 928.

The presumption of coercion is *prima facie* only, and may be rebutted. And it seems that the wife is punishable for treason, murder, or perhaps robbery, although committed in the husband's presence, this exception being made either on account of the heinous character of these offenses, or because of the improbability that the wife could be coerced into committing them. So, also, the wife may be indicted for offenses peculiar to the female sex, such as keeping a brothel or other disorderly house.⁴⁹⁴

The husband is not liable for crimes committed by the wife in his absence or without his coercion; but he is punishable for her crimes committed under his coercion.⁴⁹⁵

The married women's acts removing the wife's civil disabilities do not change the common-law rules as to her criminal responsibility.⁴⁹⁶

Marriage does not, of course, affect the husband's re-

⁴⁹⁴ 4 Bl. Comm. 28; 1 Bishop, New Crim. Law, §§ 356-366; Clark, Crim. Law (2d Ed.) 93; 1 Clark & Marshall, Crim. Law, §§ 85-87; 15 Am. & Eng. Enc. Law (2d Ed.) 901-904; monographic note 33 Am. St. Rep. 89; Mulvey v. State, 43 Ala. 316, 94 Am. Dec. 684 (illegal sale of liquor); Bibb v. State, 94 Ala. 31, 10 So. 506, 33 Am. St. Rep. 88 (murder); State v. Cleaves, 59 Me. 298, 8 Am. Rep. 422 (sale of liquor); Com. v. Daley, 148 Mass. 11, 18 N. E. 579 (sale of liquor); People v. Wright, 38 Mich. 744, 31 Am. Rep. 331 (robbery); State v. Ma Foo, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414, Woodruff Cas. 198 (mayhem); State v. Miller, 162 Mo. 253, 62 S. W. 692, 85 Am. St. Rep. 498; Davis v. State, 15 Ohio 72, 45 Am. Dec. 559 (arson).

⁴⁹⁵ Mulvey v. State, 43 Ala. 316, 94 Am. Dec. 684; Com. v. Wood, 97 Mass. 225; Com. v. Gannon, 97 Mass. 547; Com. v. Hill, 145 Mass. 305, 14 N. E. 124.

⁴⁹⁶ Clark, Crim. Law (2d Ed.) 94.

not be allowed, as against husband's creditors,

sponsibility for his own crimes, nor render the wife responsible therefor.

§ 128. Crimes against each other.

By reason of their legal unity, common residence, and interest in each other's property, it is held at common law that offenses such as larceny,⁴⁹⁷ arson,⁴⁹⁸ or criminal trespass⁴⁹⁹ cannot be committed by either spouse against the property of the other. It is held in some states, however, that this rule is changed by the married women's acts and the statutes defining larceny and arson.⁵⁰⁰

Either spouse may be prosecuted at common law, as well as under modern statutes, for certain offenses against the person of the other, such as assault and bat-

⁴⁹⁷ Reg. v. Kenny, 2 Q. B. Div. 307; State v. Banks, 48 Ind. 194, Woodruff Cas. 201; 18 Am. & Eng. Enc. Law (2d Ed.) 512; note in 57 Am. Dec. 283.

⁴⁹⁸ Rex v. March, 1 Moore, C. C. 182; Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302. In this case it was held that neither at common law nor under the married woman's property acts could a husband be guilty of arson in burning a house belonging to his wife, but occupied by both as a common residence. Arson is an offense against the right of possession, rather than the right of property. The opposite conclusion was reached in Garrett v. State, 109 Ind. 527, 10 N. E. 570, upon precisely the same facts, on the ground that, under the Indiana statute defining arson, it was an offense against property.

⁴⁹⁹ State v. Jones, 132 N. C. 1043, 43 S. E. 939, 95 Am. St. Rep. 688, 61 L. R. A. 777.

⁵⁰⁰ Hunt v. State (Ark.) 79 S. W. 769, 65 L. R. A. 71 (larceny); Garrett v. State, 109 Ind. 527, 10 N. E. 570 (arson); Beasley v. State, 138 Ind. 552, 38 N. E. 35, 46 Am. St. Rep. 418 (larceny). See note immediately preceding.

tery⁵⁰¹ or murder.⁵⁰² But the general policy of the law against the judicial recognition of matrimonial discord, except in cases of necessity, seems to limit the allowance of such proceedings to prosecutions for bodily injuries; and it has been held that a wife cannot maintain a prosecution against her husband for criminal slander⁵⁰³ or libel.⁵⁰⁴

⁵⁰¹ See 2 Am. & Eng. Enc. Law (2d Ed.) 963, and § 61, note 23.

⁵⁰² See the innumerable cases of convictions in such cases.

⁵⁰³ *State v. Edens*, 95 N. C. 696, 59 Am. Rep. 294.

⁵⁰⁴ *Reg. v. Lord Mayor of London*, 16 Q. B. Div. 772.

CHAPTER VI.

THE DISSOLUTION OF MARRIAGE.

- § 129. In General—Dissolution by Death.
- 130. Dissolution by Divorce—In General.
- 131. The Several Kinds of Divorce.
- 132. Nature of Divorce Proceedings—Parties—Cross Suit.
- 133. The Causes for Divorce—At Common Law.
- 134. Same—Statutory Grounds—In General.
- 135. Same—Adultery.
- 136. Same—Cruelty.
- 137. Same—Desertion.
- 138. Same—Other Grounds.
- 139. Defenses to Suit for Divorce—In General.
- 140. Same—Special Defenses.
- 141. Vacation of Decree for Fraud.
- 142. Foreign Divorces—Domicile—Conflict of Laws.
- 143. The Effect of Divorce.
- 144. Alimony.
- 145. Custody of Children.
- 146. Separation by Agreement of Parties.

§ 129. In general—Dissolution by death.

A marriage may be dissolved by (1) death, or (2) divorce. A marriage is, of course, dissolved by the natural death of either of the parties. As to whether civil death, *i. e.*, where a man is banished, abjures the realm, or becomes a monk,¹ would have this effect fully, so as to leave the wife free to marry again, there appears to be no direct authority. Probably it would not fully dissolve the marriage, but in all respects, save, possibly,

¹ See 1 Bl. Comm. 132.

marrying again, a wife whose husband was civilly dead might act as if sole. Civil death, in the common-law sense, does not now exist, though in some states a person sentenced to life imprisonment is declared by statute to be civilly dead.² And in several states it is provided by statute that the sentence of either party to imprisonment for life shall dissolve the marriage without any judgment of divorce or other legal process. Such a statute has been held not unconstitutional.³

§ 130. Dissolution by divorce—In general.

We have stated in a previous section that, except so far as its dissolution is provided for by law, marriage is a permanent relation, dissoluble only by the death of one of the parties.⁴ The extreme importance to society of the permanence of the marriage tie is obvious, and is generally recognized among enlightened nations, though there is now in this country a deplorable and dangerous tendency towards laxity in this important matter. Nevertheless, circumstances may arise in which a true marriage relation, subserving the purposes for which it was entered into, can no longer exist, and in such cases the law provides for the termination of the relation by divorce. Divorces have been permitted from ancient times for various causes; and while there can be no doubt that in some cases the interests of society and good morals are promoted by the dissolution of the marriage

² See 6 Am. & Eng. Enc. Law (2d Ed.) 64; 1 Bishop, Mar., Div. & Sep. §§ 1323-1354.

³ State v. Duket, 90 Wis. 272, 63 N. W. 83, 48 Am. St. Rep. 928, 31 L. R. A. 515.

⁴ See ante, § 6.

relation, it is a significant fact that generally the moral tone of a people has been high or low directly as the sanctity and permanence of the marriage tie have been strictly or loosely guarded.⁵

It should be noted that while, from the necessity of the case, the law authorizes divorces for certain causes, divorces are not favored. For the same reasons for which the law favors marriage, namely, the promotion of public morality and the perpetuation of the race, the policy of the law is opposed to divorce.^{5a} We shall find, therefore, that, as a rule, divorces are granted only for causes of so serious a nature as to defeat the purposes of the matrimonial relation.

§ 131. The several kinds of divorce.

Considered with reference to their nature, divorces are of two kinds: (1) Limited, or partial divorces, known as divorces "from board and bed" (*a mensa et thoro*), or, according to the usual order of the words, "from bed and board;" and (2) absolute or total divorces, or divorces "from the bond of matrimony" (*a vinculo matrimonii*). Absolute divorces should be distinguished from decrees of nullity, which are also generally spoken of as divorces. An absolute divorce, in the strict and proper sense, presupposes a valid marriage, and operates as an absolute severance of the mar-

⁵ See Schouler, Dom. Rel. § 220.

^{5a} 1 Bishop, Mar., Div. & Sep. §§ 38-40; Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34, 57 Am. St. Rep. 95. In this case the court said: "The state allows divorces, not as a punishment to the offending party, nor as a favor to the innocent party, but because the state believes its own prosperity will thereby be promoted."

riage relation. A decree of nullity is simply a judicial finding that there was no valid marriage, and that, for some cause existing at the time of the alleged marriage, the parties in fact never became husband and wife.⁶

The only kind of divorce recognized by the common law was the limited or partial divorce, there being no absolute divorce of persons once lawfully married. A void or voidable marriage might, however, be annulled at common law by judicial decree.⁷ In some of the states the statutes authorize the granting of limited divorces in some cases, and of absolute divorces in others, but in other states only absolute divorces are granted.

Considered with reference to the agency by which they are granted, divorces are either (1) legislative, or (2) judicial. Legislative divorces—that is, divorces granted by the legislature—were at one time common in England. There being no power in the courts to grant an absolute divorce for a cause arising after marriage, persons wishing an absolute divorce for any supervening cause—for example, adultery—could obtain relief only by an appeal directly to parliament as the law-making power. Legislative divorces are still occasionally granted in England, although power has been conferred by statute upon the courts to grant absolute divorces in certain cases.⁸ Legislative divorces have also been granted in this country; and the supreme court of the

⁶ See 2 Bishop, Mar., Div. & Sep. §§ 467-478.

⁷ As to nullity suits, see 2 Bishop, Mar., Div. & Sep. §§ 794-809.

⁸ See, generally, as to legislative divorces, 1 Bishop, Mar., Div. & Sep. §§ 1422-1471; 9 Am. & Eng. Enc. Law (2d Ed.) 730-732; *Jones v. Jones*, 95 Ala. 443, 11 So. 11, 18 L. R. A. 95, and note.

United States has held that the granting of such divorces is not objectionable as being an exercise of judicial power by the legislature,⁹ though there is authority to the contrary.¹⁰ The question is now of little importance, as legislative divorces are now expressly prohibited in most of the states by the state constitutions. Practically all divorces are now granted by the courts acting under the authority of statutes:

§ 132. Nature of divorce proceedings—Parties—Cross suit.

Originally, a suit for a divorce was a proceeding in the ecclesiastical courts, which alone had jurisdiction of matrimonial and divorce causes. The divorce suit was neither an action at law nor a suit in equity, though it resembled the latter in some respects. At present a suit for divorce is a statutory proceeding instituted under the authority of the statutes, which ordinarily confer jurisdiction of the suit upon certain designated courts, and to some extent prescribe the mode of procedure to be followed. A divorce suit is a proceeding *sui generis*, though in some states it is regarded as substantially a suit in equity. So far as it affects the matrimonial status merely, and to some extent the custody of children, also, the proceeding is *in rem*; but so far as it affects the collateral property rights of the parties, or charges the husband with the payment of alimony, it is *in personam*. The suit is not an action on contract, but

⁹ Maynard v. Hill, 125 U. S. 190, Woodruff Cas. 242.

¹⁰ 9 Am. & Eng. Enc. Law (2d Ed.) 730. See, also, In re Christiansen, 17 Utah, 412, 53 Pac. 1003, 70 Am. St. Rep. 794, 41 L. R. A. 504.

is in the nature of an action in tort. It is a civil, and not a criminal proceeding.¹¹

The parties to a divorce suit are, strictly speaking, the husband and wife alone. Neither the children of the marriage nor third persons whose rights may be collaterally involved need or can be made parties.¹² In a sense, however, the state, as a party to every marriage, is also a party to every suit for divorce, the suit being a triangular proceeding between husband and wife and the state. But while the state is interested in every suit for divorce, it is not formally a party thereto. Its interests are usually protected by the court, which takes care to see that no divorce shall be granted in an improper case, as where there is fraud, collusion, insufficient evidence, etc. In a few states it is by statute made the duty of the prosecuting attorney or other officer to appear and defend as attorney for the state.¹³

The right to sue for a divorce is a personal right, and, as a rule, should be asserted personally. Except where a different rule is established by statute or local practice, the wife may sue or defend in proper person, coverture being no disability. So, also, an infant may sue or be sued without the intervention of a guardian or next

¹¹ 7 Enc. Pl. & Pr. 51-57; 2 Bishop, Mar., Div. & Sep., *passim*.

¹² 7 Enc. Pl. & Pr. 58-59; 2 Bishop, Mar., Div. & Sep. §§ 499-536. A suit for divorce abates upon the death of either of the parties while it is pending. *Kimball v. Kimball*, 44 N. H. 122, 82 Am. Dec. 194, and note. It is otherwise in the case of a nullity suit. *Barth v. Barth*, 102 Ky. 56, 42 S. W. 1116, 80 Am. St. Rep. 335.

¹³ 9 Am. & Eng. Enc. Law (2d Ed.) 729; 2 Bishop, Mar., Div. & Sep. §§ 489-497; *Dennis v. Dennis*, 68 Conn. 186, 36 Atl. 34, 57 Am. St. Rep. 95; *Allen v. Allen*, 73 Conn. 54, 46 Atl. 242, 84 Am. St. Rep. 135; *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260.

friend. In some jurisdictions, however, the general rules as to disability apply to divorce suits as well as to ordinary suits.¹⁴

There is some conflict among the authorities as to whether a suit for divorce may be maintained by or against the guardian or committee of an insane party to the marriage, such party being manifestly incapable of suing or defending in person. In some jurisdictions this matter is settled by statute; but in the absence of any statutory provisions on the subject, the better rule seems to be that the guardian or committee of an insane person cannot maintain a suit for absolute divorce on behalf of his ward, though he might maintain a suit to annul the marriage on account of the ward's insanity at the time the marriage was contracted, and probably may also maintain a suit for a divorce from bed and board where such divorces are allowed. But a suit for divorce may be maintained by a sane plaintiff against the guardian or committee of an insane defendant for a cause arising before the defendant became insane. In such case the defendant's insanity is no defense.¹⁵

If the defendant in a divorce suit has a ground for a divorce from the plaintiff, he or she may bring a cross suit by cross bill or cross complaint against the plaintiff,

¹⁴ 7 Enc. Pl. & Pr. 60, 61; 2 Bishop, Mar., Div. & Sep. §§ 513-515.

¹⁵ See, generally, 7 Enc. Pl. & Pr. 62-66; 2 Bishop, Mar., Div. & Sep. §§ 516-532; note in 82 Am. Dec. 200; *Worthy v. Worthy*, 36 Ga. 45, 91 Am. Dec. 758; *Bradford v. Abend*, 89 Ill. 78, 31 Am. Rep. 67; *Mohler v. Shank*, 93 Iowa, 274, 61 N. W. 981, 57 Am. St. Rep. 274, 34 L. R. A. 161; *Birdzell v. Birdzell*, 33 Kan. 433, 52 Am. Rep. 539; *Sims v. Sims*, 121 N. C. 297, 28 S. E. 407, 61 Am. St. Rep. 665, 40 L. R. A. 737.

and it may happen that the plaintiff in the original suit fails to obtain a divorce from the defendant therein, while the defendant obtains a divorce from the plaintiff in his or her cross suit. So far as the severance of the marriage relation is concerned, the effect is, of course, the same in either case; but very different results may follow in respect to matters collaterally involved, such as the distribution of property, the payment of alimony, the custody of children, etc. If it appears that the allegations on both sides are true, both suits will be dismissed, for in such case, since both parties are in the wrong, neither is entitled to relief.¹⁶

§ 133. The causes for divorce—At common law.

As we have just seen, the only kind of divorce that could be granted by the courts at common law for a cause arising after marriage was a divorce *a mensa et thoro*. This could be granted for two causes only, namely, (1) adultery of either party, and (2) cruelty. The so-called absolute divorce, or decree of nullity, could be granted only for a cause existing at the time of marriage,—that is, the canonical impediments of (1) consanguinity and affinity, and (2) impotency. These rendered the marriage voidable, and, being deemed sinful, the parties were separated “for the safety of their souls” (*pro salute animarum*), for which reason the divorce could be obtained only during the life of both of the parties. By the decree the marriage was declared void *ab*

¹⁶ 7 Enc. Pl. & Pr. 96-100; 2 Bishop, Mar., Div. & Sep. §§ 559-564; Wadsworth v. Wadsworth, 81 Cal. 182, 22 Pac. 648, 15 Am. St. Rep. 38. See, also, as to recrimination as a defense, post, § 140.

initio.¹⁷ The civil or legal disabilities of prior marriage, want of age, and want of reason rendered a marriage void without any judicial decree, and hence no divorce was necessary, though a formal divorce in such cases was sometimes obtained as a matter of prudence. A marriage obtained by force, being probably absolutely void, would doubtless be governed by the same rule; while a marriage procured by fraud, being voidable only, could perhaps be avoided only by judicial process. In any case, a suit would be advisable. A decree of nullity would also be proper and advisable in cases in which a marriage is void for any other reason than those above stated, as, for example, because not celebrated as required by law, mandatory provisions of the statute having been disregarded.¹⁸

§ 134. Same—Statutory grounds—In general.

The subject of divorce is regulated in all of the states by statute, except in South Carolina, where no divorces are granted for any cause.¹⁹ The power of the legislature to make laws on the subject of divorce is undoubted,²⁰ but all such laws must apply equally to all

¹⁷ 1 Bl. Comm. 440. See ante, § 8.

¹⁸ *Barth v. Barth*, 102 Ky. 56, 42 S. W. 1116, 80 Am. St. Rep. 335. See ante, §§ 8, 15, 18.

¹⁹ *McCarty v. McCarty*, 2 Strobb. (S. C.) 6, 47 Am. Dec. 585; *McCreery v. Davis*, 44 S. C. 195, 22 S. E. 178, 51 Am. St. Rep. 794, 28 L. R. A. 655.

²⁰ *Tolen v. Tolen*, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742. The granting of divorce does not impair the obligation of contracts. See ante, § 4, note 10.

The constitution of the United States confers no power upon the government of the United States to regulate marriage or divorce in the states. *Andrews v. Andrews*, 188 U. S. 14.

persons within the state. A divorce law which discriminates in favor of or against certain classes of persons is void.²¹ In general, the legislature may authorize the granting of divorces by the courts for any cause that it deems sufficient,²² but it seems that the causes of divorce should be weighty, and that the marriage relation ought not to be dissolved on trivial grounds. As was well said in a famous case: "Though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off. They become good husbands and good wives from the necessity of remaining husbands and wives, for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that, upon mutual disgust, married persons might be legally separated, many couples who now pass through the world with mutual comfort, with attention to their common offspring, and to the moral order of civil society, might have been at this moment living in a state of

²¹ *Middleton v. Middleton*, 54 N. J. Eq. 692, 35 Atl. 1065, 37 Atl. 1106, 55 Am. St. Rep. 602, 36 L. R. A. 221.

²² *Hickman v. Hickman*, 1 Wash. 257, 22 Am. St. Rep. 148. In this case it was held that the fact that the cause of divorce (insanity) was due to the defendant's misfortune, rather than to her misconduct, did not affect the validity of the statute authorizing a divorce on such ground.

mutual unkindness, in a state of estrangement from their common offspring, and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good."²³

Divorces being now granted solely under authority conferred by statute, no divorce can be granted except for a cause allowed by the statute.²⁴ The statutory grounds vary considerably in the different states.²⁵ The principal grounds are adultery, cruelty, and desertion. On account of their importance, we shall consider them somewhat in detail.

§ 135. Same—Adultery.

Adultery, in divorce law, is the voluntary sexual intercourse of a married person with one not the husband or wife of the offender. It is immaterial whether the person with whom the act is committed is married or single.²⁶ Adultery is a ground for divorce in all of the

²³ Per Sir William Scott, in *Evans v. Evans*, 2 Hagg. 35, 4 Eng. Ecc. Rep. 310.

²⁴ *Maddox v. Maddox*, 189 Ill. 152, 59 N. E. 599, 82 Am. St. Rep. 431; *Stewart v. Stewart*, 78 Me. 548, 57 Am. Rep. 822. See, also, *Hamaker v. Hamaker*, 18 Ill. 137, 65 Am. Dec. 705. The repeal of the statute under which a cause for divorce arose does not necessarily take away the right to a divorce for such cause. *Tufts v. Tufts*, 8 Utah, 142, 30 Pac. 309, 16 L. R. A. 482. As to whether there can be a vested right to a divorce, see *Allen v. Allen*, 73 Conn. 186, 46 Atl. 242, 84 Am. St. Rep. 135, 49 L. R. A. 142.

²⁵ Consult the statutes, and see note in 65 Am. Dec. 708, in which the statutory provisions in force some years ago in the various states are set out.

²⁶ See, generally, 1 Bishop, Mar., Div. & Sep. §§ 1493-1523; 9 Am. & Eng. Enc. Law (2d Ed.) 746-764.

As to proof of adultery, see 9 Am. & Eng. Enc. Law (2d Ed.)

states (except in South Carolina, where no divorces are granted), but in some jurisdictions, as in England, Kentucky, North Carolina, and Texas, while simple adultery on the part of the wife is sufficient to entitle the husband to a divorce, there must be some aggravation, such as living in adultery, on the part of the husband to give the wife a corresponding right.²⁷

To constitute adultery, the sexual intercourse must be voluntary. Thus, the wife is not guilty of adultery if she is the victim of rape,²⁸ or was insane at the time of the act.²⁹ But the mere fact that the act was committed in good faith, in the belief that it was sanctioned by a valid marriage, is not necessarily an excuse. Thus, a person who enters into a void second marriage believing, through a mistake of law, that a prior marriage has been dissolved by a divorce which is, in fact, either void or not absolute, is guilty of adultery.³⁰ But it is otherwise where the second marriage was contracted under a mistake of fact, as that a former spouse, long absent, was dead,³¹ or that a valid divorce had been obtained.^{31a}

748-764; *Burke v. Burke*, 44 Kan. 307, 24 Pac. 466, 21 Am. St. Rep. 283.

²⁷ 1 Bishop, Mar., Div. & Sep. §§ 153, 1505; *Setzer v. Setzer*, 128 N. C. 170, 38 S. E. 731, 83 Am. St. Rep. 666.

²⁸ See *People v. Chapman*, 62 Mich. 280, 4 Am. St. Rep. 857.

²⁹ *Broadstreet v. Broadstreet*, 7 Mass. 474; *Nichols v. Nichols*, 31 Vt. 328, 73 Am. Dec. 352; note in 34 L. R. A. 162. But see, contra, *Matchin v. Matchin*, 6 Pa. St. 332, 47 Am. Dec. 466, which case is said, in an appended note, to be wholly unsupported by authority.

³⁰ *Simonds v. Simonds*, 103 Mass. 572, 4 Am. Rep. 576; *Moors v. Moors*, 121 Mass. 232, *Woodruff Cas.* 212.

³¹ *Valleau v. Valleau*, 6 Paige (N. Y.) 207.

^{31a} *Pratt v. Pratt*, 157 Mass. 503, 32 N. E. 747. But see *Gordon v. Gordon*, 141 Ill. 160, 30 N. E. 446, 33 Am. St. Rep. 294, 21 L. R. A. 387.

§ 136. Same—Cruelty.

Cruelty as a ground for divorce is any conduct in one of the married parties which, to the reasonable apprehension of the other, or in fact, renders cohabitation physically unsafe, to a degree justifying a withdrawal therefrom.³² It is sometimes difficult to determine whether or not certain acts do or do not constitute cruelty in a particular case. Plainly, the same acts may amount to cruelty in one case and not in another. Much will depend upon the mental and physical constitution of the party aggrieved. It would seem that the definition of cruelty should be kept within rather strict limits, and that a divorce should not be granted on trivial grounds.³³

³² 1 Bishop, Mar., Div. & Sep. § 1531. See, generally, as to cruelty as a ground for divorce, 1 Bishop, Mar., Div. & Sep. §§ 1524-1552, 9 Am. & Eng. Enc. Law (2d Ed.) 783-811; notes in 65 Am. St. Rep. 69, and 6 L. R. A. 187; *Morris v. Morris*, 14 Cal. 76, 73 Am. Dec. 615, and note; *Ring v. Ring*, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878; *Poor v. Poor*, 8 N. H. 307, 29 Am. Dec. 664, and note; *Robinson v. Robinson*, 66 N. H. 600, 23 Atl. 362, 49 Am. St. Rep. 632; *Latham v. Latham*, 30 Grat. (Va.) 307.

³³ The leading case on the subject is *Evans v. Evans* (1790) 1 Hagg. Consist. 35, 4 Eng. Ecc. 310, decided by Lord Stowell (then Sir William Scott), whose opinion in this case, says Mr. Bishop, has gained almost the weight of a statute. Without attempting a definition, Lord Stowell, after declaring that the rule as to what constitutes cruelty should be kept extremely strict, says: "The causes must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged. * * * What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty." This language has been frequently quoted with approval by the courts.

In some states the statutes authorize a divorce only for "extreme" or "extreme and repeated" cruelty.³⁴

To constitute cruelty the act or treatment need not amount to actual violence,³⁵ but it must be such as causes some physical injury, either to body, limbs, or health, or excites a reasonable apprehension thereof. Ill treatment causing mental suffering merely is not cruelty;³⁶ but treatment producing mental suffering resulting in an injury to health constitutes cruelty, although not accompanied with actual violence.³⁷ Thus,

³⁴ 1 Bishop, Mar., Div. & Sep. §§ 1534, 1535; *Mahone v. Mahone*, 19 Cal. 626, 81 Am. Dec. 91.

³⁵ *Green v. Green*, 131 N. C. 533, 42 S. E. 954, 92 Am. St. Rep. 788; *Braun v. Braun*, 194 Pa. 287, 44 Atl. 1096, 75 Am. St. Rep. 699. Requiring the wife to submit to excessive sexual intercourse, to the injury of her health, is cruelty. *Mayhew v. Mayhew*, 61 Conn. 233, 23 Atl. 966, 29 Am. St. Rep. 195; *Melvin v. Melvin*, 58 N. H. 569, 42 Am. Rep. 605; *Gardner v. Gardner*, 104 Tenn. 410, 58 S. W. 342, 78 Am. St. Rep. 924. See, also, *McMahan v. McMahan*, 186 Pa. 485, 40 Atl. 795, 41 L. R. A. 802.

In Illinois it is held that, to constitute cruelty, there must be acts of physical violence, or threats raising a reasonable apprehension of bodily hurt. *Maddox v. Maddox*, 189 Ill. 152, 59 N. E. 599, 82 Am. St. Rep. 431, 52 L. R. A. 628.

³⁶ *Waldron v. Waldron*, 85 Cal. 251, 268, 24 Pac. 649, 858, 9 L. R. A. 487; *Eshbach v. Eshbach*, 23 Pa. 343; *Johnson v. Johnson*, 107 Wis. 186, 83 N. W. 291, 81 Am. St. Rep. 836.

³⁷ *Kelly v. Kelly*, 2 Prob. & Div. 31, 59; *Fleming v. Fleming*, 95 Cal. 430, 30 Pac. 566, 29 Am. St. Rep. 124; *Reinhard v. Reinhard*, 96 Wis. 555, 71 N. W. 803, 65 Am. St. Rep. 66. Under a statute authorizing a divorce for treatment injuring health or endangering reason, it was held that the practice of Christian Science as a doctor by a wife, against the will of her husband (a druggist), who was abnormally sensitive, and whose health was injured by his wife's conduct, was sufficient ground for divorce. *Robinson v. Robinson*, 66 N. H. 600, 23 Atl. 362, 49 Am. St. Rep. 632, *Woodruff Cas.* 214. In other cases, however, it has been held that the conduct complained of must be accompanied with an intention to wound the feel-

it may be cruelty for either consort, whether husband³⁸ or wife,³⁹ falsely to accuse the other of adultery. What treatment will produce such mental suffering as to impair health will obviously depend upon the mental and physical condition of the particular individual.⁴⁰

In most cases the cruelty complained of consists of actual violence. A single act of violence will not ordinarily justify a decree of divorce,⁴¹ and never where the statutory ground is repeated cruelty.⁴² But in some cases a single act may be sufficient, especially where the circumstances indicate that it may be repeated.⁴³ Moreover, mere threats creating a reasonable apprehension of personal injury are sufficient without actual violence.⁴⁴

ings of the party aggrieved. *Ring v. Ring*, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878; *W—— v. W——*, 141 Mass. 495, 6 N. E. 541, 55 Am. Rep. 491.

³⁸ *Palmer v. Palmer*, 45 Mich. 150, 40 Am. Rep. 461; *Pinkard v. Pinkard*, 14 Tex. 356, 65 Am. Dec. 356; *Bahn v. Bahn*, 62 Tex. 518, 50 Am. Rep. 539. See, also, 1 *Bishop*, Mar., Div. & Sep. § 1569; *Wheeler v. Wheeler*, 53 Iowa, 511, 36 Am. Rep. 240; *Owens v. Owens*, 96 Va. 191, 31 S. E. 72.

³⁹ *Carpenter v. Carpenter*, 30 Kan. 712, 2 Pac. 122, 46 Am. Rep. 108; *Kelly v. Kelly*, 18 Nev. 49, 51 Am. Rep. 732. But see *McAlister v. McAlister*, 71 Tex. 695, 10 S. W. 294.

⁴⁰ *Fleming v. Fleming*, 95 Cal. 430, 30 Pac. 566, 29 Am. St. Rep. 124; *Robinson v. Robinson*, 66 N. H. 600, 23 Atl. 362, 49 Am. St. Rep. 632, *Woodruff Cas.* 214. Cruelty is a relative term; its existence frequently depends upon the character and refinement of the parties, and the conclusion to be reached in each case depends upon its own particular facts. *Kelly v. Kelly*, 18 Nev. 49, 51 Am. Rep. 732.

⁴¹ *Hoshall v. Hoshall*, 51 Md. 72, 34 Am. Rep. 298; *Nye's Appeal*, 126 Pa. 341, 17 Atl. 618, 12 Am. St. Rep. 873; *Hardie v. Hardie*, 162 Pa. 227, 29 Atl. 886, 25 L. R. A. 697.

⁴² *Fritz v. Fritz*, 138 Ill. 436, 32 Am. St. Rep. 156, 11 L. R. A. 685.

⁴³ *Albert v. Albert*, 5 Mont. 577, 51 Am. Rep. 86; *Beyer v. Beyer*, 50 Wis. 254, 36 Am. Rep. 848.

⁴⁴ *D'Aguilar v. D'Aguilar*, 1 Hagg. 773, 3 Eng. Ecc. 329; *Harratt v. Harratt*, 7 N. H. 196, 26 Am. Dec. 730.

But mere drunkenness, even though accompanied with outbursts of passion and violence, is ordinarily not cruelty.⁴⁵

It seems that there must be some affirmative act or conduct to constitute cruelty. Thus, it has been held that the mere failure of the husband to support and provide for his wife,⁴⁶ or of the wife to nurse and wait upon her sick husband,⁴⁷ is not cruelty, however reprehensible such neglect may be in morals. So, also, the denial of marital intercourse, even though complete, is not cruelty.⁴⁸

As a general rule, a divorce will not be granted where the alleged cruelty was provoked by the misconduct of

⁴⁵ *Shutt v. Shutt*, 71 Md. 193, 17 Am. St. Rep. 519. But cruelty caused by drunkenness is a cause for divorce. *McVickar v. McVickar*, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. Rep. 422. The habitual use of morphine is not cruelty. *Ring v. Ring*, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878; *Youngs v. Youngs*, 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313, 6 L. R. A. 548.

⁴⁶ *Maddox v. Maddox*, 139 Ill. 152, 59 N. E. 599, 82 Am. St. Rep. 431, 52 L. R. A. 628. The case of *Menzer v. Menzer*, 83 Mich. 319, 47 N. W. 219, 21 Am. St. Rep. 605, is somewhat in conflict with the text. In this case a husband had conveyed his home and furniture, constituting the bulk of his property, to his wife. She afterwards refused to cohabit with him, and although she, for a time, allowed him a room in the house, she finally drove him from it, and moved away, and leased the house to strangers. It was held that she was guilty of extreme cruelty, entitling the husband to a divorce.

Nonsupport by the husband is in some states an independent ground for divorce.

⁴⁷ *Bonney v. Bonney*, 175 Mass. 7, 55 N. E. 461, 78 Am. St. Rep. 473. In this case the husband was financially able to hire a nurse, though his wife opposed it.

⁴⁸ *Cowles v. Cowles*, 112 Mass. 298. See, also, *D'Aguilar v. D'Aguilar*, 1 Hagg. 773, 3 Eng. Ecc. 329; *Eshbach v. Eshbach*, 23 Pa. 343.

the plaintiff.⁴⁹ The provocation, however, must be reasonably proportionate in seriousness to the defendant's conduct. Thus, it has been held that a wife may obtain a divorce from her husband for beating her, even though she provoked the assault by abusive words.⁵⁰

It should be noted that a divorce is granted for cruelty, not as a punishment for an offense already committed, but as a protection against probable future acts of cruelty.⁵¹

§ 137. Same—Desertion.

Desertion as a matrimonial offense is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or the wrongful conduct of the other.⁵²

To constitute desertion there must be, first, an actual breaking off of the matrimonial cohabitation, and secondly, an intent to desert.⁵³ It is generally held that

⁴⁹ 9 Am. & Eng. Enc. Law (2d Ed.) 806; Poor v. Poor, 8 N. H. 307, 29 Am. Dec. 664. See, also, Morris v. Morris, 14 Cal. 76, 73 Am. Dec. 615; Youngs v. Youngs, 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313; Hoshall v. Hoshall, 51 Md. 72, 34 Am. Rep. 298.

⁵⁰ Albert v. Albert, 5 Mont. 577, 51 Am. Rep. 86.

⁵¹ 1 Bishop, Mar., Div. & Sep. § 1536; Morris v. Morris, 14 Cal. 76, 73 Am. Dec. 615.

⁵² 1 Bishop, Mar., Div. & Sep. § 1662. Desertion, in the law of divorce, is the voluntary separation of one party from the other without justification, with the intention of not returning. Williams v. Williams, 130 N. Y. 193, 29 N. E. 98, 27 Am. St. Rep. 517.

See, generally, as to desertion, 1 Bishop, Mar., Div. & Sep. §§ 1653-1778; 9 Am. & Eng. Enc. Law (2d Ed.) 764-781; note in 9 L. R. A. 696.

⁵³ Johnson v. Johnson, 22 Colo. 20, 43 Pac. 130, 55 Am. St. Rep. 112; Hardie v. Hardie, 162 Pa. St. 227, 29 Atl. 886, 25 L. R. A. 697;

the mere refusal of sexual intercourse without sufficient reason is not desertion.⁵⁴ Mr. Bishop, however, takes a contrary view.⁵⁵ The separation must be against the will, or, at least, without the consent, of the other party. A separation by mutual consent is not desertion.⁵⁶ Again, the separation must be without legal excuse. If either party leaves the other for good cause, this is not desertion.⁵⁷ There is some conflict as to what constitutes a legal justification for breaking off matrimonial cohabitation. The better view appears to be that it must be "some physical or mental impediment creating an impossibility to do otherwise, or such ill conduct in the other party as might be foundation for a divorce suit."⁵⁸ A wife who, without excuse, refuses to follow her husband when he, in good faith, changes his domicile, is guilty of desertion.⁵⁹ Rather curiously it has

Pinkard v. Pinkard, 14 Tex. 356, 65 Am. Dec. 129; Bailey v. Bailey, 21 Grat. (Va.) 43; Latham v. Latham, 30 Grat. (Va.) 307.

⁵⁴ Fritz v. Fritz, 138 Ill. 436, 28 N. E. 1058, 32 Am. St. Rep. 156, 14 L. R. A. 685; Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95; Watson v. Watson, 52 N. J. Eq. 349, 28 Atl. 467, Woodruff Cas. 221. The refusal of sexual intercourse is not "utter desertion." Stewart v. Stewart, 78 Me. 548, 57 Am. Rep. 822.

⁵⁵ 1 Bishop, Mar., Div. & Sep. § 1676 et seq. It seems that the authorities cited by Mr. Bishop in support of his position are not in point. See note in 14 L. R. A. 685.

⁵⁶ 2 Bishop, Mar., Div. & Sep. § 1475; Cooper v. Cooper, 17 Mich. 205, 97 Am. Dec. 182; Herold v. Herold, 47 N. J. Eq. 210, 20 Atl. 375, 9 L. R. A. 696; Bailey v. Bailey, 21 Grat. (Va.) 43.

⁵⁷ Doolittle v. Doolittle, 78 Iowa, 691, 43 N. W. 616, 6 L. R. A. 187; Williams v. Williams, 130 N. Y. 193, 29 N. E. 98, 27 Am. St. Rep. 517, 14 L. R. A. 220.

⁵⁸ 1 Bishop, Mar., Div. & Sep. § 1778. See Fritz v. Fritz, 138 Ill. 436, 28 N. E. 1058, 32 Am. St. Rep. 156, 14 L. R. A. 685; Taylor v. Taylor, 80 Iowa, 29, 20 Am. St. Rep. 394.

⁵⁹ 9 Am. & Eng. Enc. Law (2d Ed.) 767. See ante, § 63.

been held that where one party drives the other away by force or misconduct constituting ground for divorce, the offender is guilty of desertion.⁶⁰

In some states the desertion must continue for a prescribed period to constitute a ground for divorce.⁶¹

§ 138. Same—Other grounds.

Besides the principal grounds already considered, divorces may be granted in some states for insanity,⁶² habitual drunkenness or intemperance,⁶³ imprisonment

⁶⁰ 9 Am. & Eng. Enc. Law (2d Ed.) 770; *Lea v. Lea*, 99 Mass. 423, 96 Am. Dec. 772; *McVickar v. McVickar*, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. Rep. 422. Where a husband is compelled, by his wife's cruelty and misconduct, to leave her and live apart, he is entitled to a divorce from her on the ground that she has abandoned him. *Setzer v. Setzer*, 128 N. C. 170, 38 S. E. 731, 83 Am. St. Rep. 666. A wife who leaves her husband, with his consent, because he fails to support her, cannot obtain a divorce on the ground of his desertion. *Ingersoll v. Ingersoll*, 49 Pa. 249, 88 Am. Dec. 500.

⁶¹ See *Danforth v. Danforth*, 88 Me. 120, 33 Atl. 781, 51 Am. St. Rep. 380, 31 L. R. A. 608, *Woodruff's Cas.* 223.

⁶² *Hickman v. Hickman*, 1 Wash. St. 257, 24 Pac. 445, 22 Am. St. Rep. 148. In the absence of statute, insanity arising after marriage is not a ground for divorce. *Hamaker v. Hamaker*, 18 Ill. 137, 65 Am. Dec. 705; *Jewis v. Lewis*, 44 Minn. 124, 46 N. W. 323, 20 Am. St. Rep. 559. See, generally, note in 34 L. R. A. 161.

An action for divorce may be maintained against an insane defendant who became insane after the cause of action accrued. *Harrigan v. Harrigan*, 135 Cal. 397, 67 Pac. 506, 87 Am. St. Rep. 118.

⁶³ *Mahone v. Mahone*, 19 Cal. 626, 81 Am. Dec. 91; *Dennis v. Dennis*, 68 Conn. 186, 36 Atl. 34, 57 Am. St. Rep. 95, 34 L. R. A. 449; *Allen v. Allen*, 73 Conn. 54, 46 Atl. 242, 84 Am. St. Rep. 135, 49 L. R. A. 142; *McBee v. McBee*, 22 Or. 329, 29 Pac. 887, 29 Am. St. Rep. 613; note 34 L. R. A. 449. Habitual intoxication produced by the use of morphine is not "habitual drunkenness," within the meaning of the statute. *Ring v. Ring*, 112 Ga. 854, 38 S. E. 330; *Youngs v. Youngs*, 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313, 6 L. R. A. 548.

in the penitentiary or conviction of crime,⁶⁴ nonsupport,⁶⁵ and various other grounds.⁶⁶

§ 139. Defenses to suit for divorce—In general.

Since a divorce presupposes a valid marriage, it is a good defense to a suit for divorce⁶⁷ that the parties were never married,⁶⁸ or that their marriage was void for some reason, as that one of the parties was already married,⁶⁹ or for other reason.

It is also a good defense that the defendant was insane at the time of committing the act or acts relied upon as a ground of divorce.⁷⁰

§ 140. Same—Special defenses.

There are several special defenses which, if established, will defeat a suit for divorce, namely:

⁶⁴ *Davis v. Davis*, 19 Ky. L. R. 1520, 43 S. W. 168, 39 L. R. A. 403; *Leonard v. Leonard*, 151 Mass. 151, 23 N. E. 732, 21 Am. St. Rep. 437, 6 L. R. A. 632; note in 31 L. R. A. 515. See *Caswell v. Caswell*, 64 Vt. 557, 24 Atl. 988, 33 Am. St. Rep. 943.

⁶⁵ 9 Am. & Eng. Enc. Law (2d Ed.) 781.

Under a statute making nonsupport a ground for divorce, a divorce will not be granted for the husband's failure to support his wife when he was unable to do so, even though his inability was the result of imprisonment for crime. *Hammond v. Hammond*, 15 R. I. 40, 2 Am. St. Rep. 867.

⁶⁶ See 1 Bishop, Mar., Div. & Sep. §§ 1779-1832.

⁶⁷ As to defenses, see, generally, 9 Am. & Eng. Enc. Law (2d Ed.) 839.

⁶⁸ *Kilburn v. Kilburn*, 89 Cal. 46, 26 Pac. 636, 23 Am. St. Rep. 447; *Van Dusen v. Van Dusen*, 97 Mich. 70; *Harbeck v. Harbeck*, 102 N. Y. 714.

⁶⁹ 9 Am. & Eng. Enc. Law (2d Ed.) 839. In such case, however, a nullity suit, sometimes called a suit for divorce, may be maintained. *Barth v. Barth*, 102 Ky. 56, 42 S. W. 1116, 80 Am. St. Rep. 335; *Lea v. Lea*, 104 N. C. 603, 10 S. E. 488, 17 Am. St. Rep. 692.

⁷⁰ 1 Bishop, Mar., Div. & Sep. §§ 1115, 1577; 9 Am. & Eng. Enc. Law (2d Ed.) 839. See, also, ante, § 135, note 29.

(1) *Recrimination*. Recrimination is the defense that the plaintiff is guilty of misconduct constituting a cause for divorce. The misconduct of the plaintiff need not be the same as that of the defendant, and, according to the better view, it is immaterial whether it is a ground for a divorce *a mensa* only, or for an absolute divorce, and this, whether the plaintiff sues for a limited or an absolute divorce.⁷¹

(2) *Condonation*. Condonation is the remission by one of the married parties of an offense which he knows the other has committed against the marriage, on condition of being continually thereafter treated with conjugal kindness. In other words, it is a conditional forgiveness. The breach of the condition, either by a repetition of the original offense or by the commission of some other offense constituting a ground for divorce, revives the condoned offense. Moreover, the condonation must be with knowledge of the offense, and mere forgiveness is not sufficient to amount to condonation without a conditional restoration of the offender to his or her conjugal rights. Continued cohabitation as husband

⁷¹ 2 Bishop, Mar., Div. & Sep. §§ 337-409; 9 Am. & Eng. Enc. Law (2d Ed.) 816-821; notes in 86 Am. St. Rep. 333, and 15 Am. Dec. 211; Decker v. Decker, 193 Ill. 285, 61 N. E. 1108, 86 Am. St. Rep. 325, 55 L. R. A. 697; Burke v. Burke, 44 Kan. 307, 24 Pac. 466, 21 Am. St. Rep. 283; Fisher v. Fisher, 95 Md. 315, 52 Atl. 898, 93 Am. St. Rep. 334; Smith v. Smith, 4 Paige (N. Y.) 432, 27 Am. Dec. 75; Mattox v. Mattox, 2 Ohio, 233, 15 Am. Dec. 547; Mathewson v. Mathewson, 18 R. I. 456, 28 Atl. 801, 49 Am. St. Rep. 782; Church v. Church, 16 R. I. 667, 19 Atl. 244, 7 L. R. A. 385; Pease v. Pease, 72 Wis. 136, 39 N. W. 133, Woodruff Cas. 231; Hubbard v. Hubbard, 74 Wis. 650, 43 N. W. 655, 6 L. R. A. 58. The plaintiff's fault must be such as constitutes a cause for divorce. Setzer v. Setzer, 128 N. C. 170, 38 S. E. 731, 83 Am. St. Rep. 666.

and wife will ordinarily constitute condonation. But the cohabitation must be voluntary, and the presumption of condonation where the parties continue to live together is not so strong against the wife as against the husband, for, by reason of her dependence upon him, she may be unable to find a home elsewhere.⁷²

(3) *Connivance*. Connivance is the consent or indifference of the complainant to the misconduct of which he complains as a cause of divorce. Although available in a suit for divorce for any cause, it is generally set up as a defense to divorce for adultery. A husband who leads or entraps his wife into committing adultery is guilty of connivance, but not where, suspecting her guilt, he merely takes steps to procure proof. For this purpose he may watch her and permit her to commit adultery, but he may not invite her to do so. Connivance of one act of adultery will bar a suit for that or a subsequent, but not a prior, adultery.⁷³

⁷² 2 Bishop, Mar., Div. & Sep. §§ 267-336; 9 Am. & Eng. Enc. Law (2d Ed.) 822-828; Durant v. Durant, 1 Hagg. 733; D'Aguilar v. D'Aguilar, 1 Hagg. 773; Beeby v. Beeby, 1 Hagg. 789; Alexandre v. Alexandre, 2 Prob. & Div. 164, Woodruff Cas. 225; May v. May, 108 Iowa, 1, 78 N. W. 703, 75 Am. St. Rep. 478; Cumming v. Cumming, 135 Mass. 386, 46 Am. Rep. 476; Jones v. Jones, 18 N. J. Eq. 33, 90 Am. Dec. 607, and note; Shackleton v. Shackleton, 48 N. J. Eq. 364, 21 Atl. 935, 27 Am. St. Rep. 478; Smith v. Smith, 4 Paige (N. Y.) 432, 27 Am. Dec. 75; Langdon v. Langdon, 25 Vt. 678, 60 Am. Dec. 296.

⁷³ 9 Am. & Eng. Enc. Law (2d Ed.) 829-832; 2 Bishop, Mar., Div. & Sep. §§ 201-248; note in 12 L. R. A. 524; Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34, 57 Am. St. Rep. 95; May v. May, 108 Iowa, 1, 78 N. W. 703, 75 Am. St. Rep. 202; Robbins v. Robbins, 140 Mass. 528, 54 Am. Rep. 488; Morrison v. Morrison, 142 Mass. 361, 56 Am. Rep. 688; Wilson v. Wilson, 154 Mass. 194, 28 N. E. 167, 26 Am. St. Rep. 237, 12 L. R. A. 524, Woodruff Cas. 227.

(4) *Collusion*. Collusion is a conspiracy of the husband and wife to obtain a divorce by suppression of the facts, or by false or manufactured testimony. A divorce will be denied where it appears that the parties have colluded for the purpose of obtaining it.⁷⁴ And contracts between husband and wife promoting their divorce are contrary to public policy and void.⁷⁵ Upon the same principle, it is held that a cause for a divorce cannot be established by the admissions or confessions of the parties alone, without corroborating evidence. Any other rule would enable persons unhappily mated to dissolve their marriage by a collusive admission of a ground of divorce which did not in fact exist.⁷⁶

§ 141. Vacation of decree for fraud.

If a decree of divorce has been obtained by either party to the marriage by fraud, it may be set aside by the court in which the decree was rendered upon the application of the party aggrieved. This is in accordance with the general rule that a court may vacate its

⁷⁴ 8 Am. & Eng. Enc. Law (2d Ed.) 832-836; 2 Bishop, Mar., Div. & Sep. §§ 249-266; Barnes v. Barnes, 1 Prob. & Div. 505, Woodruff Cas. 229.

⁷⁵ Mucklenburg v. Holler, 29 Ind. 139, 92 Am. Dec. 345; Comstock v. Adams, 23 Kan. 513, 33 Am. Rep. 191; Carey v. Mackey, 82 Me. 516, Woodruff Cas. 88; Belden v. Munger, 5 Minn. 211, 80 Am. Dec. 407; Blank v. Nohl, 112 Mo. 159, 20 S. W. 477, 18 L. R. A. 350; Sayles v. Sayles, 21 N. H. 312, 53 Am. Dec. 208; Palmer v. Palmer, 26 Utah, 31, 72 Pac. 3, 99 Am. St. Rep. 820. See post, § 146.

⁷⁶ 9 Am. & Eng. Enc. Law (2d Ed.) 845; Richardson v. Richardson, 4 Port. (Ala.) 467, 30 Am. Dec. 538; Fisher v. Fisher, 95 Md. 315, 52 Atl. 898, 93 Am. St. Rep. 334; Latham v. Latham, 30 Grat. (Va.) 307.

own decrees if procured by fraud.⁷⁷ The decree may be set aside, even though the rights of innocent third parties are thereby prejudiced,⁷⁸ and although a second marriage has taken place, and issue been born thereof.⁷⁹ And the fact that the party who procured the divorce is dead does not necessarily defeat a suit to vacate the decree. Thus a wife, in order to establish her rights as her husband's widow, may maintain a suit to set aside a decree of divorce obtained by her husband in his lifetime.⁸⁰ But the jurisdiction to vacate decrees of divorce should be exercised with caution, especially after a long lapse of time, and after changes in the status and property rights of persons concerned have been made on the faith of such decrees.⁸¹ A decree will not be set aside at the suit of a party guilty of fraud in obtaining

⁷⁷ 7 Enc. Pl. & Pr. 138-140; 2 Bishop, Mar., Div. & Sep. §§ 1539-1577; note in 61 Am. Dec. 459; Brown v. Grove, 116 Ind. 84, 9 N. E. 823, 9 Am. St. Rep. 823; Edson v. Edson, 108 Mass. 590, 11 Am. Rep. 393, distinguishing Greene v. Greene, 2 Gray (Mass.) 361, 61 Am. Dec. 454; Colby v. Colby, 59 Minn. 432, 61 N. W. 460, 50 Am. St. Rep. 420; Wisdom v. Wisdom, 24 Neb. 551, 39 N. W. 594, 8 Am. St. Rep. 215; Adams v. Adams, 51 N. H. 388, 12 Am. Rep. 134; State v. Watson, 20 R. I. 354, 39 Atl. 193, 78 Am. St. Rep. 871.

⁷⁸ Rush v. Rush, 46 Iowa, 648, 26 Am. Rep. 179.

⁷⁹ Simpkins v. Simpkins, 14 Mont. 386, 36 Pac. 759, 43 Am. St. Rep. 641; Nichells v. Nichells, 5 N. D. 125, 64 N. W. 73, 57 Am. St. Rep. 540; Allen v. Maclellan, 12 Pa. 328, 51 Am. Dec. 608.

⁸⁰ Lawrence v. Nelson, 113 Iowa, 277, 85 N. W. 84, 57 L. R. A. 583; Johnson v. Coleman, 23 Wis. 453, 99 Am. Dec. 193. But for circumstances in which such relief was denied, see Carr v. Carr, 92 Ky. 552, 36 Am. St. Rep. 614; Moyer v. Koontz, 103 Wis. 22, 79 N. W. 50, 74 Am. St. Rep. 837. See note in 57 L. R. A. 583.

⁸¹ Adams v. Adams, 51 N. H. 388, 12 Am. Rep. 131.

it or consenting thereto. Thus, a decree of divorce obtained by collusion cannot be attacked by either party.⁸²

The decree may be vacated only in the same court in which it was rendered;⁸³ but other courts may ignore decrees of divorce fraudulently obtained in some cases, as, for example, where the divorce was obtained in another state upon a fraudulent pretense by the plaintiff that he or she was domiciled in such state. Such a divorce is void for want of jurisdiction, and no proceeding to vacate it is necessary.⁸⁴ It seems that a decree of divorce may be vacated for fraud only at the suit of the immediate parties to the divorce suit,—that is to say, of the husband or the wife.^{84a}

The effect of vacating a decree of divorce is to place the parties back in the same situation as they were in before the divorce was granted, although there may have been a subsequent marriage and the birth of children,—the former marital status is revived.⁸⁵ It follows that a man who cohabits with his second wife after the vacation of a decree dissolving his first marriage may be prosecuted for adultery.⁸⁶

⁸² *Karren v. Karren*, 25 Utah, 87, 69 Pac. 465, 95 Am. St. Rep. 815, 60 L. R. A. 294. See post, § 142, note 96, and note in 60 L. R. A. 294.

⁸³ 2 Bishop, Mar., Div. & Sep. § 1556.

⁸⁴ See post, § 142.

^{84a} *Tyler v. Aspinwall*, 73 Conn. 493, 47 Atl. 755, 54 L. R. A. 758; *Baugh v. Baugh*, 37 Mich. 59, 26 Am. Rep. 495.

⁸⁵ *Comstock v. Adams*, 23 Kan. 513, 33 Am. Rep. 191; *Voorhees v. Voorhees' Ex'rs*, 46 N. J. Eq. 411, 19 Atl. 172, 19 Am. St. Rep. 404.

⁸⁶ *State v. Watson*, 20 R. I. 354, 39 Atl. 193, 78 Am. St. Rep. 871.

§ 142. Foreign divorces—Domicile—Conflict of laws.

It is well settled that each state has the exclusive right to determine the status of its own domiciled citizens, and no state has the right to fix or control the status of the citizens of other states. Again, the constitution of the United States provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; but it is held that, in the case of a judgment rendered in another state, the question of jurisdiction may always be inquired into, and, if it appear that the court rendering judgment had no jurisdiction, such judgment is a nullity.⁸⁷ From these principles it follows that a divorce granted in a state in which both parties are domiciled is valid everywhere, although the marriage may have taken place, or the ground of divorce arisen, in another state.⁸⁸

So, also, where the parties are domiciled in different states, a divorce obtained in the state where the plain-

⁸⁷ *Andrews v. Andrews*, 188 U. S. 14; *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21; *Van Fossen v. State*, 37 Ohio St. 317, 41 Am. Rep. 507. See, generally, as to the extraterritorial effect of divorce decrees and conflict of laws in divorce matters, 2 Bishop, Mar., Div. & Sep. §§ 1-200; 9 Am. & Eng. Enc. Law (2d Ed.) 741-746; Minor, Conf. Laws, §§ 84-96; monographic note in 59 L. R. A. 135; notes in 7 Am. Dec. 206, 21 Am. Dec. 747, 83 Am. St. Rep. 616, 11 L. R. A. 443, and 19 L. R. A. 515; *Cumington v. Belchertown*, 149 Mass. 223, 21 N. E. 435, 4 L. R. A. 131; *Fairchild v. Fairchild*, 53 N. J. Eq. 678, 34 Atl. 10, 51 Am. St. Rep. 650; *Rigney v. Rigney*, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. Rep. 462; *McCreery v. McCreery*, 44 S. C. 195, 22 S. E. 178, 51 Am. St. Rep. 794, 28 L. R. A. 655; *Cook v. Cook*, 56 Wis. 195, 43 Am. Rep. 706.

⁸⁸ 2 Bishop, Mar., Div. & Sep. § 48; *Cheeley v. Clayton*, 110 U. S. 701; *Roth v. Roth*, 104 Ill. 35, 44 Am. Rep. 81.

tiff is domiciled is valid everywhere.⁸⁹ A suit for divorce is a proceeding both quasi *in rem* and *in personam*,—*in rem* in so far as it affects the status; *in personam* in so far as the decree amounts to a personal judgment against the defendant for alimony, costs, etc.⁹⁰ So far as the decree determines merely the status, it is effective, although the defendant never appeared, and was not personally served with process. Constructive service is sufficient. This result necessarily follows from the fact that the divorce granted to one party necessarily divorces the other, for there can be no husband without a wife, and *vice versa*.⁹¹ But

⁸⁹ *Atherton v. Atherton*, 181 U. S. 155, reversing 155 N. Y. 129, 63 Am. St. Rep. 650; *Thompson v. Thompson*, 91 Ala. 591, 8 So. 419, 11 L. R. A. 443; *Loker v. Gerald*, 157 Mass. 42, 34 Am. St. Rep. 252. See cases cited in note 91, *infra*. The courts of the state in which the plaintiff has a bona fide domicile have jurisdiction of a suit for divorce against a nonresident defendant for a cause which arose in another state. *Tolen v. Tolen*, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742. *Succession of Benton*, 106 La. 494, 31 So. 123, 59 L. R. A. 135; *Jones v. Jones*, 67 Miss. 195, 6 So. 712, 19 Am. St. Rep. 299. And the nonresident defendant may maintain a cross bill in such case. *Clutton v. Clutton*, 108 Mich. 267, 66 N. W. 52, 31 L. R. A. 160.

⁹⁰ *Rigney v. Rigney*, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. Rep. 462. See *ante*, § 138.

⁹¹ *Estate of Newman*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146; *In re James' Estate*, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60; *Dunham v. Dunham*, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70; *Felt v. Felt*, 59 N. J. Eq. 606, 45 Atl. 105, 49 Atl. 1071, 83 Am. St. Rep. 612; *Kempson v. Kempson*, 63 N. J. Eq. 783, 52 Atl. 360, 625, 92 Am. St. Rep. 682. See, also, *McGrew v. Mut. L. Ins. Co.*, 132 Cal. 85, 64 Pac. 103, 84 Am. St. Rep. 20. And see, *contra*, in New York and North Carolina, *Williams v. Williams*, 130 N. Y. 193, 29 N. E. 98, 27 Am. St. Rep. 517, 14 L. R. A. 220; *Harris v. Harris*, 115 N. C. 587, 20 S. E. 187, 44 Am. St. Rep. 471. Where a wife leaves her husband without good cause, and he afterwards removes to another state, and there acquires a domicile and obtains a divorce from his wife,

no personal judgment can be rendered against a defendant upon mere constructive service. The court has jurisdiction of the status of the plaintiff only.⁹² It should be remembered in this connection that the wife may acquire a separate domicile from the husband for divorce purposes.⁹³

A divorce granted in a state of which neither party is a domiciled citizen is without jurisdiction and void, except, perhaps, in the state in which it is granted.⁹⁴

such divorce is valid, although the wife remains a resident of his former domicile, for in such case her domicile follows his. *Loker v. Gerald*, 157 Mass. 42, 31 N. E. 709, 34 Am. St. Rep. 252.

⁹² *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 Pac. 345, 53 Am. St. Rep. 165, 32 L. R. A. 82; *Rigney v. Rigney*, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. Rep. 462; *Prosser v. Warner*, 47 Vt. 667, 19 Am. Rep. 132; *Smith v. Smith*, 74 Vt. 20, 51 Atl. 1060, 93 Am. St. Rep. 882. But if a husband, sued in another state by his wife residing in such state, appears and defends the suit, he thereby submits to the jurisdiction; and a personal judgment for alimony may be rendered against him. *Lynde v. Lynde*, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679; *Arrington v. Arrington*, 102 N. C. 491, 9 S. E. 200, 127 N. C. 190, 37 S. E. 212, 80 Am. St. Rep. 791. See, also, *Jones v. Jones*, 108 N. Y. 415, 2 Am. St. Rep. 447. It has been held that while a divorce granted in a state in which the defendant was not domiciled operates to dissolve the marriage relation, it does not affect the defendant's marital rights in the plaintiff's property situated in the state of defendant's domicile. *Doerr v. Forsythe*, 50 Ohio St. 726, 35 N. E. 1055, 40 Am. St. Rep. 703.

⁹³ See ante, § 63.

⁹⁴ *Bell v. Bell*, 181 U. S. 175; *Streitwolf v. Streitwolf*, 181 U. S. 179; *Watkins v. Watkins*, 125 Ind. 163, 25 N. E. 175, 21 Am. St. Rep. 217; *Litowich v. Litowich*, 19 Kan. 451, 27 Am. Rep. 145; *Sewall v. Sewall*, 122 Mass. 156, 23 Am. Rep. 299; *Magowan v. Magowan*, 57 N. J. Eq. 322, 42 Atl. 330, 73 Am. St. Rep. 645; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. Rep. 299; *St. Sure v. Lindsfelt*, 82 Wis. 346, 52 N. W. 308, 33 Am. St. Rep. 50, 19 L. R. A. 515.

Such void divorce is no defense to a criminal prosecution of either of the parties in the domicile state for subsequently marrying again

A *bona fide* domicile of the plaintiff, at least, is essential to confer jurisdiction, and the fact that both parties voluntarily appeared and consented to the jurisdiction does not give validity to the proceedings, except as between themselves.⁹⁵ But the parties themselves are bound by the decree thus fraudulently or collusively obtained, and cannot avoid it in a collateral proceeding afterwards instituted in the state of their actual domicile.⁹⁶

To confer jurisdiction, the plaintiff must have a *bona fide* domicile in the state in which the suit is brought. A mere colorable residence, as where the plaintiff goes to the state and resides therein for the purpose of procuring a divorce, is not sufficient, and a divorce so obtained is void.⁹⁷ Where, however, the plaintiff has

during the lifetime of the other. *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21; *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260; *Van Fossen v. State*, 37 Ohio St. 317, 41 Am. Rep. 507. And the fact that the laws of the state in which the divorce was granted authorized the granting of divorces to nonresidents is immaterial, for such laws are void, no state having the power to regulate the domestic relations of citizens of other states. *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21; *Van Fossen v. State*, 37 Ohio St. 317, 41 Am. Rep. 507.

⁹⁵ See *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260.

⁹⁶ *In re Ellis' Estate*, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, *Woodruff's Cas.* 208, 23 L. R. A. 287; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132. See, also, *Starbuck v. Starbuck*, 173 N. Y. 503, 66 N. E. 193, 93 Am. St. Rep. 631; notes in 23 L. R. A. 287, and 60 L. R. A. 294. But see, contra, *Andrews v. Andrews*, 188 U. S. 14.

⁹⁷ *Andrews v. Andrews*, 188 U. S. 14; *Dunham v. Dunham*, 162 Ill. 582, 44 N. E. 841, 35 L. R. A. 70; *Lawrence v. Nelson*, 113 Iowa, 277, 85 N. W. 84, 57 L. R. A. 583; *Hanover v. Turner*, 14 Mass. 227, 7 Am. Dec. 203; *Reed v. Reed*, 52 Mich. 117, 50 Am. Rep. 247; *Magowan v. Magowan*, 57 N. J. Eq. 322, 42 Atl. 330, 73 Am. St. Rep. 645; *Streitwolf v. Streitwolf*, 58 N. J. Eq. 563, 41 Atl. 876, 43 Atl. 683; 78 Am. St. Rep. 630, affirmed 181 U. S. 179; and cases cited in

acquired a *bona fide* domicile in the state in which the suit is brought, the fact that he had not resided therein as long as its laws require before commencing the suit does not affect the validity of the divorce. The decree in such case, though irregular, is valid, the irregularity not affecting the jurisdiction of the court.⁹⁸

The validity of a divorce is to be determined by the law of the state in which it is granted,⁹⁹ provided, of course, the courts of such state have jurisdiction of the cause; and, as we have already seen, the question of jurisdiction depends wholly upon domicile. If the state in which the suit is brought is the domicile of both of the parties, or of the plaintiff alone, the decree of divorce is valid everywhere, although the marriage was celebrated or the cause of divorce arose in some other state;¹⁰⁰ and where the cause arose in another state, the question as to whether it constitutes a ground for divorce is to be determined by the law of the state of domicile and forum, and not by the law of the state in which it arose.¹⁰¹

note 94, *supra*. Where husband and wife are domiciled in the same state, a court of equity of that state, at the suit of the wife, may enjoin the husband from prosecuting a suit for divorce in another state, of which he fraudulently claims to be a resident. *Kempson v. Kempson*, 63 N. J. Eq. 783, 52 Atl. 360, 625, 92 Am. St. Rep. 682.

⁹⁸ *Kern v. Field*, 68 Minn. 317, 71 N. W. 393, 64 Am. St. Rep. 479. This decision is plainly correct. It is the fact that the plaintiff is a citizen of the state, and not the length of time he has been such, that confers jurisdiction.

⁹⁹ *Tolen v. Tolen*, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742.

¹⁰⁰ 2 Bishop, Mar., Div. & Sep. §§ 160-178; *Jones v. Jones*, 67 Miss. 195, 6 So. 712, 19 Am. St. Rep. 299; *Hubbell v. Hubbell*, 3 Wis. 662, 62 Am. Dec. 702.

¹⁰¹ This seems to follow necessarily from the principles just

§ 143. The effect of divorce.

Divorce a mensa et thoro. A divorce from board and bed does not dissolve the marriage, but leaves the parties still husband and wife, and, in general, does not greatly affect their personal disabilities or property rights. The wife, however, may acquire a separate domicile, and is not subject to the husband's control while the cohabitation is suspended. The rights of dower, curtesy, administration, etc., are not affected. Neither party can marry again, except by remarrying the other. Children previously born or begotten are legitimate, but children of the wife begotten after the decree are presumed to be illegitimate, though this presumption may be rebutted by showing access by the husband.¹⁰² In some states the above rule has been changed by statute, especially in matters relating to property rights, so as to give to a decree of divorce from bed and board more nearly the effect, except as to marrying again, of a decree of absolute divorce.¹⁰³ At common law, in case of a limited divorce, the decree of separation was limited in its effect until the parties should become reconciled. Under modern statutes it may be for a limited time or forever.¹⁰⁴

stated, and seems generally to be accepted as law without question. But see *Hick v. Hick*, 5 Bush (Ky.) 670, and *Harteau v. Harteau*, 14 Pick. (Mass.) 181, 25 Am. Dec. 372.

¹⁰² 9 Am. & Eng. Enc. Law (2d Ed.) 852, 853; 2 Bishop, Mar., Div. & Sep. §§ 1671-1695.

¹⁰³ 9 Am. & Eng. Enc. Law (2d Ed.) 853; *Marshall v. Baynes*, 88 Va. 1040, 14 S. E. 978.

¹⁰⁴ 2 Bishop, Mar., Div. & Sep. § 476; 9 Am. & Eng. Enc. Law (2d Ed.) 852.

Decree of nullity. Where the decree is not one of dissolution, but of nullity, the marriage being declared void *ab initio*, the parties stand as though they had never been married. As between themselves, their respective property rights are what they were before marriage, but the rights of third persons who have in good faith acquired the wife's property from the husband during the coverture will be protected. The children born of such a union are illegitimate, except where declared legitimate by statute. The husband cannot claim curtesy or the wife's personalty, nor can the wife claim dower. The wife resumes her maiden name. In short, everything depending on the marriage falls with the marriage.¹⁰⁵

Divorce a vinculo matrimonii. A decree dissolving a valid marriage for some cause arising after marriage does not operate retrospectively so as to render the marriage void *ab initio*, but takes effect only from the date of the decree. Thereafter the parties are no longer husband and wife, and can claim none of the rights and are subject to none of the disabilities growing out of coverture. The decree cannot operate retrospectively so as to take away vested property rights (e. g., the husband's right to the wife's personal property in possession), but all nonvested rights depending on the marriage, such as dower or curtesy, fall with the marriage. Children born of the marriage are not rendered illegiti-

¹⁰⁵ 2 Bishop, Mar., Div. & Sep. §§ 1596-1609; *Henneger v. Lomas*, 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848; *Kelly v. Scott*, 5 Grat. (Va.) 479.

As to the legal effect of a void marriage, see monographic note in 96 Am. St. Rep. 267.

mate by the divorce. The wife retains her husband's surname, though in some states she is permitted to resume her maiden name, as she probably might do at common law.¹⁰⁶

§ 144. Alimony.

In a suit for divorce the court may compel the husband to pay to the wife an allowance for her support and maintenance. Such allowance is called "alimony." Its payment may be ordered pending the suit for the support of the wife and to enable her to prosecute or defend the suit, in which case it is called "*alimony pendente lite*," or temporary alimony; or it may be ordered in the decree for the support of the wife after the divorce, in which case it is called "permanent alimony."

Whether alimony shall be awarded or not, and its amount if awarded, are largely matters of discretion with the courts. The circumstances of the parties will be considered, and alimony will not be awarded if the wife does not need it or the husband cannot pay it. The allowance may include the support of children, and its amount may be increased or diminished as the

¹⁰⁶ 8 Am. & Eng. Enc. Law (2d Ed.) 523; 9 Am. & Eng. Enc. Law (2d Ed.) 853 et seq.; 10 Am. & Eng. Enc. Law (2d Ed.) 200; 2 Bishop, Mar., Div. & Sep. §§ 1610-1670. See *Roe v. Roe*, 52 Kan. 724, 35 Pac. 808, 39 Am. St. Rep. 367; *Alt v. Banholzer*, 39 Minn. 511, 40 N. W. 830, 12 Am. St. Rep. 681, and note; *Kern v. Field*, 68 Minn. 317, 71 N. W. 393, 64 Am. St. Rep. 479; *Doyle v. Rolwing*, 165 Mo. 231, 65 S. W. 315, 55 L. R. A. 332; *Stelz v. Shreck*, 128 N. Y. 263, 28 N. E. 510, 26 Am. St. Rep. 475; *Brady v. Kreuger*, 8 S. D. 464, 66 N. W. 1083, 59 Am. St. Rep. 771; *Ames v. Norman*, 4 Sneed (Tenn.) 683, 70 Am. Dec. 269; *Hopson v. Fowlkes*, 92 Tenn. 697; *Porter v. Porter*, 27 Grat. (Va.) 599, 36 Am. St. Rep. 120; *Cralle v. Cralle*, 79 Va. 182.

case demands. The remarriage of the wife will not necessarily affect the allowance of alimony, but if the second husband is able to support her it may be cut off. So, also, a wife does not necessarily forfeit her right to alimony by adultery, but alimony will be refused where she lives with or is supported by her paramour. The right to alimony ordinarily ceases upon the death of the husband or wife.¹⁰⁷

Since the duty to pay alimony grows out of the duty of support, alimony cannot be decreed in favor of the husband, the wife not being bound to support her husband.¹⁰⁸ In some states, however, alimony or maintenance out of the wife's estate is allowed by statute to the husband.¹⁰⁹

¹⁰⁷ 2 Am. & Eng. Enc. Law (2d Ed.) 91; 2 Bishop, Mar., Div. & Sep. 655; notes in 60 Am. Dec. 665. See *Gaston v. Gaston*, 114 Cal. 542, 46 Pac. 609, 55 Am. St. Rep. 86; *Cairnes v. Cairnes*, 29 Colo. 260, 68 Pac. 233, 93 Am. St. Rep. 55; *Eickhoff v. Eickhoff*, 29 Colo. 295, 68 Pac. 237, 93 Am. St. Rep. 64; *Haddon v. Haddon*, 36 Fla. 413, 18 So. 779, *Woodruff Cas.* 239; *Cole v. Cole*, 142 Ill. 19, 31 N. E. 109, 34 Am. St. Rep. 56; *Bardin v. Bardin*, 4 S. D. 305, 56 N. W. 1069, 46 Am. St. Rep. 791; *Harris v. Harris*, 31 Grat. (Va.) 13; *Heninger v. Heninger*, 90 Va. 271, 18 S. E. 193, *Woodruff Cas.* 236. As to alimony after the husband's death, see *Murphy v. Moyle*, 17 Utah, 113, 53 Pac. 1010, 70 Am. St. Rep. 767, and note. Alimony may be allowed in a statutory action to have a marriage declared void because of the husband's prior undissolved marriage. *Lea v. Lea*, 104 N. C. 603, 10 S. E. 488, 17 Am. St. Rep. 692. The fact that the husband has afterwards married again does not relieve him from the duty of paying alimony as decreed. *State v. Brown*, 31 Wash. 397, 72 Pac. 86, 62 L. R. A. 974. See note to this case on the effect of the second marriage of husband or wife on the obligation to pay alimony in report last cited.

¹⁰⁸ *Greene v. Greene*, 49 Neb. 546, 68 N. W. 947, 34 L. R. A. 110.

¹⁰⁹ 2 Am. & Eng. Enc. Law (2d Ed.) 92; note in 34 L. R. A. 110.

§ 145. Custody of children.

In granting a decree of divorce the court will usually determine the custody of the children of the marriage, awarding the custody to the husband or wife or to a third person, as the welfare of the child may demand, the child's welfare being the principal consideration in determining the matter of its custody. The court may also provide for the custody and support of the children pending the suit.¹¹⁰

§ 146. Separation by agreement of parties.

Inasmuch as the consent of the state is required to effect a marriage, it would seem that such consent is necessary to dissolve it, and that the husband and wife cannot, by their own act, divorce themselves,¹¹¹ and this is the general doctrine. Agreements for a future separation, this being in effect a divorce from bed and board, are in this country generally considered as contrary to public policy, and void; and this was formerly the law in England, but at present such agreements are there enforced. And in some states, agreements for immediate separation are held valid, it being in several states so provided by statute. In general it may be said that the law on this subject is in an unsatisfactory

¹¹⁰ See, as to custody and support of children, 2 Bishop, Mar., Div. & Sep. §§ 1149-1224; 9 Am. & Eng. Enc. Law (2d Ed.) 866-871; Hall v. Green, 87 Me. 122, 32 Atl. 796, 47 Am. St. Rep. 311, and note; Harris v. Harris, 115 N. C. 587, 20 S. E. 187, 44 Am. St. Rep. 471; Zilley v. Dunwiddie, 98 Wis. 428, 74 N. W. 126, 67 Am. St. Rep. 820.

¹¹¹ Husband and wife cannot divorce themselves by mutual consent. Hilton v. Roylance, 25 Utah, 129, 69 Pac. 660, 95 Am. St. Rep. 660, 58 L. R. A. 723. See ante, § 140, note 75.

condition. But whether the agreement be considered as valid or not as to the separation, collateral agreements by which the parties already separated adjust their property rights, or the husband agrees to maintain his wife while living apart from him, would seem, on principle, to be valid, and it is generally so held. The deed or agreement is ordinarily made through the intervention of a trustee, owing to the disability of the wife to contract with the husband; but under the statutes of some of the states, no trustee is necessary.¹¹²

¹¹² See, generally, Schouler, Dom. Rel. §§ 215-218; 1 Bishop, Mar., Div. & Sep. §§ 1260-1312; 25 Am. & Eng. Enc. Law (2d Ed.) 451; notes in 83 Am. St. Rep. 859, and 90 Am. Dec. 367; Jones v. Lamont, 118 Cal. 499, 50 Pac. 766, 62 Am. St. Rep. 251; Scherer v. Scherer, 23 Ind. App. 384, 55 N. E. 494, 77 Am. St. Rep. 437; Carey v. Mackey, 82 Me. 516, 20 Atl. 84, 17 Am. St. Rep. 500, 9 L. R. A. 113; Foote v. Nickerson, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554; Buttlar v. Buttlar, 57 N. J. Eq. 645, 42 Atl. 755, 73 Am. St. Rep. 648; Galusha v. Galusha, 116 N. Y. 635, 22 N. E. 1114, 15 Am. St. Rep. 453, 6 L. R. A. 487; Clark v. Fosdick, 118 N. Y. 7, 22 N. E. 1111, 16 Am. St. Rep. 732, 6 L. R. A. 132; Henderson v. Henderson, 37 Or. 141, 60 Pac. 597, 61 Pac. 136, 82 Am. St. Rep. 741, 48 L. R. A. 766; Kaiser's Estate, 199 Pa. 269, 49 Atl. 79, 85 Am. St. Rep. 785; Switzer v. Switzer, 26 Grat. (Va.) 574; Baun v. Baun, 109 Wis. 47, 85 N. W. 122, 83 Am. St. Rep. 854.

PART II.

PARENT AND CHILD.

CHAPTER VII.

THE ESTABLISHMENT OF THE RELATION.

- § 147. In General.
- 148. The Several Classes of Children.
- 149. Presumption of Legitimacy.
- 150. Legitimation of Illegitimate Child.
- 151. Adoption of Children.

§ 147. In general.

The next domestic relation which we shall consider is that of parent and child. This relation, termed by Blackstone the most universal in nature, differs from the relation of husband and wife, from which it usually results, and from the relation of guardian and ward, in that it is established by nature itself, and is not an artificial creature of the law. But although created independently of any act of the law, it is nevertheless subject to legal regulation and control, the principles of law by which it is governed being, however, comparatively few and simple. We shall discuss in this chapter the establishment of the relation proper by nature, and of the analogous artificial relation by authority of law.

§ 148. The several classes of children.

The relation of parent and child may be either the natural relation established by nature, or an artificial relation created by the parties by authority of law. According to the character of this relation, children are of two sorts,—natural and adopted; and natural children are likewise divided into two classes,—legitimate and illegitimate. Strictly speaking, the relation of parent and child means the relation of a parent and his natural legitimate child. At common law, a legitimate child is one that is born in lawful wedlock, or within a competent time afterwards, or, in other words, a child born or begotten in wedlock. A child begotten before but born after marriage, or begotten during wedlock, but born after the husband's death, is legitimate, and all others are illegitimate.¹ Children of a void marriage are, of course, illegitimate at common law, as are also children of a voidable marriage which has been rendered void by a decree of nullity.²

§ 149. Presumption of legitimacy.

When a married woman gives birth to a child, the presumption is that the husband is the father, and that the child is legitimate. In such case the common-law courts apply the maxim of the civil law that *pater est quem nuptiæ demonstrant*. So strongly does the law favor legitimacy that anciently this presumption was

¹ 1 Bl. Comm. 446; 3 Am. & Eng. Enc. Law (2d Ed.) 871; *Zachman v. Zachman*, 201 Ill. 380, 66 N. E. 256, 94 Am. St. Rep. 180. See post, § 168.

² 1 Bl. Comm. 440. See ante, §§ 8, 143.

held to be conclusive, provided the husband was anywhere within the four seas which surround the kingdom of Great Britain (*infra quartuor maria*), and was capable of procreation. This absurd doctrine has long since been repudiated, and the law now is that in any case the presumption of legitimacy is *prima facie* only, and may be rebutted by proof that the husband is not the father. The presumption of legitimacy is, however, very strong, and the evidence in rebuttal must be clear and convincing.³

§ 150. Legitimation of illegitimate child.

Legitimation is the investment of a child of illegitimate birth with the legal status of a legitimate child. At common law the only mode by which an illegitimate child could be legitimated was by special act of parliament, there being no rule of the common law nor general statute authorizing legitimation. By the more humane rule of the civil and canon laws, a child begotten and born out of wedlock was made legitimate by the subsequent intermarriage of his parents.⁴ In this coun-

³ 3 Am. & Eng. Enc. Law (2d Ed.) 873; Estate of Mills, 137 Cal. 298, 70 Pac. 91, 92 Am. St. Rep. 175; Wright v. Hicks, 12 Ga. 155, 56 Am. Dec. 451; Id., 15 Ga. 160, 60 Am. Dec. 687; Orthwein v. Thomas, 127 Ill. 554, 21 N. E. 430, 11 Am. St. Rep. 159; Zachman v. Zachman, 201 Ill. 380, 66 N. E. 256, 94 Am. St. Rep. 180; Scanlon v. Walshe, 81 Md. 118, 31 Atl. 488, 48 Am. St. Rep. 488; Egbert v. Greenwalt, 44 Mich. 245, 38 Am. Rep. 260; Hemmenway v. Towner, 1 Allen (Mass.) 209, Woodruff Cas. 289; Woodward v. Blue, 107 N. C. 407, 12 S. E. 453, 22 Am. St. Rep. 897; Dennison v. Page, 29 Pa. 420, 72 Am. Dec. 644, and note; Smith v. Perry, 80 Va. 563; Scott v. Hillenberg, 85 Va. 245. As to evidence of husband or wife to prove legitimacy, see note in 69 Am. St. Rep. 571.

⁴ 1 Bl. Comm. 455; 2 Kent, Comm. 209.

try, in most if not all of the states, general legitimation statutes have been passed. In some states the rule of the civil law is adopted, and the intermarriage of the parents, without more, will make the child legitimate; in other states, the father's acknowledgment of the child is sufficient; while in others there must be both intermarriage and acknowledgment by the father.⁵ Statutes also generally provide that the issue of a void or voidable marriage shall be legitimate, notwithstanding the invalidity of the marriage, thus changing the harsh rule of the common law.⁶

§ 151. Adoption of children.

Adoption is an act by which the relation of parent and child is created in law between persons not so related by nature. The adoption of children, though recognized by the civil law, is unknown to the common law, and there can be no legal adoption except where authorized by statute. Statutes authorizing adoption have been passed in many of the states. These statutes prescribe the mode, conditions, and effect of adoption,

⁵ 3 Am. & Eng. Enc. Law (2d Ed.) 895; Minor, Conf. Laws, § 99; Broch v. Johnson, 85 Ind. 397, Woodruff Cas. 292; Van Horn v. Van Horn, 107 Iowa, 247, 77 N. W. 846, 45 L. R. A. 93; Scanlon v. Walshe, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488; Ives v. McNicoll, 59 Ohio St. 402, 53 N. E. 60, 69 Am. St. Rep. 780; Rohrer v. Muller, 22 Wash. 151, 60 Pac. 122, 50 L. R. A. 350.

⁶ Leonard v. Braswell, 95 Ky. 528, 36 S. W. 684, 36 L. R. A. 707; Greenhow v. James, 80 Va. 636, 56 Am. Rep. 603.

As to conflict of laws in matters of legitimacy and legitimation, see Minor, Conf. Laws, §§ 97-100; Williams v. Kimball, 35 Fla. 49, 16 So. 783, 48 Am. St. Rep. 238; Succession of Petit, 49 La. Ann. 625, 21 So. 717, 62 Am. St. Rep. 659; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321; Miller v. Miller, 91 N. Y. 315, 43 Am. Rep. 669.

the persons who may adopt or be adopted, and, in general, regulate the subject. Adoption is usually effected by a proper proceeding in court. As a rule, the consent of the parents or guardian of the child must be obtained.

The effect of adoption will depend, of course, upon the terms of the particular statute governing the case. In general, adoption places the child adopted more or less completely in the position, as to rights, duties, etc., of a natural, legitimate child. He is to all intents and purposes the child of his adopted parents, at least so far as the relations between himself and them are concerned. His natural parents, if living, have no longer any control over him, and owe him no duty as parents; nor does he owe them any duty as their child. Upon the death of his adopted parents he may inherit from them, and he may also usually inherit from his natural parents. There is some conflict as to who may inherit from him upon his death intestate and without issue, leaving both natural and adopted parents or their kin. It would seem that the better view would be that his adopted parents should be considered in such case as his heirs at law or distributees. Of course, an adopted child can claim no rights as the "issue" or "bodily heir" or "next of kin" of his adopted parents, where such rights are created by wills, etc., in such a manner that natural children of the adopting parents might take.⁷

⁷ 1 Am. & Eng. Enc. Law (2d Ed.) 726; notes in 12 Am. St. Rep. 100, and 39 Am. St. Rep. 210; *Cofer v. Scroggins*, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54; *In re Williams*, 102 Cal. 70, 36 Pac. 409, 41 Am.

Besides the regular and technical adoption just considered, the law recognizes a sort of informal adoption, where a person, meaning to put himself *in loco parentis*, takes upon himself the duty of a father to make provision for a child not his own, to this extent assuming the parental character. No legal duties or rights result from such relation, except that the person *in loco parentis* is under a qualified obligation to support the child, and has a corresponding right to his services.⁸ The most familiar instance of this relation is found in the case of stepparents and stepchildren.⁹

St. Rep. 163; Estate of McKeag, 141 Cal. 403, 74 Pac. 1039, 99 Am. St. Rep. 80; Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196; Watts v. Dull, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141; Butterfield v. Sawyer, 187 Ill. 598, 58 N. E. 602, 79 Am. St. Rep. 246; Flannigan v. Howard, 200 Ill. 396, 65 N. E. 782, 93 Am. St. Rep. 201, 59 L. R. A. 664; Humphries v. Davis, 100 Ind. 274, Woodruff Cas. 295; Warren v. Prescott, 84 Me. 483, 24 Atl. 948, 30 Am. St. Rep. 370, 17 L. R. A. 435; Morrison v. Estate of Sessions, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500; Clarkson v. Hatton, 143 Mo. 47, 44 S. W. 761, 65 Am. St. Rep. 635; Phillips v. McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753; Furgeson v. Jones, 17 Or. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620, Woodruff Cas. 303; Non-She-Po v. Wa-Win-Ta, 37 Or. 213, 62 Pac. 15, 82 Am. St. Rep. 749; Schiltz v. Roenitz, 86 Wis. 31, 56 N. W. 194, 39 Am. St. Rep. 873, 21 L. R. A. 483; Parsons v. Parsons, 101 Wis. 76, 77 N. W. 147, 70 Am. St. Rep. 894; Nugent v. Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

⁸ See Bennet v. Bennet, L. R. 10 Ch. Div. 474; Whitaker v. Warren, 60 N. H. 20, 49 Am. Rep. 302; Clark v. Bayer, 32 Ohio St. 299, 30 Am. Rep. 593.

⁹ See post, § 169.

CHAPTER VIII.

THE DUTIES AND LIABILITIES OF PARENTS.

§ 152. In General.

- 153. Duty of Maintenance—In General.
- 154. Same—Nature of Duty as Moral or Legal.
- 155. Same—Liability for Necessaries.
- 156. Same—Where Child is not Living with Parent.
- 157. Duty of Protection.
- 158. Duty of Education.
- 159. Liability to Third Persons for Torts of Child.

§ 152. In general.

A parent owes to his legitimate child three duties, namely, maintenance, protection, and education. We shall consider each duty in detail.

§ 153. Duty of maintenance—In general.

It is the duty of parents to provide for the maintenance of their minor children. This duty falls primarily on the father, who is bound to support his infant children, even though they may have property of their own, or may be capable of earning their own living.¹⁰ During the father's lifetime, the mother, in the absence

¹⁰ 1 Bl. Comm. 447; 2 Kent, Comm. 191; 21 Am. & Eng. Enc. Law (2d Ed.) 1049; Presley v. Davis, 7 Rich. Eq. (S. C.) 105, 62 Am. Dec. 396; Nat. Valley Bank v. Hancock, 100 Va. 101, 40 S. E. 611, 95 Am. St. Rep. 933. See, generally, cases cited in §§ 153-156. The surviving father, and not the child's estate, is liable for the funeral expenses of a minor child. Rowe v. Raper, 23 Ind. App. 27, 54 N. E. 770, 77 Am. St. Rep. 411.

of a decree of court or statute providing otherwise, is under no obligation to support their children.¹¹ But if the father is dead, the duty of support devolves upon the mother, provided the child has no property and is unable to earn a living, but not otherwise.¹² A step-father is not bound to support his stepchildren, but if he receives them into his family and assumes towards them a parental relation, he is bound to support them.¹³

Where the father is unable to support his child, and the child has property of his own, a court of equity, upon application of the father, will make an allowance to him out of the child's estate for the child's support.¹⁴ Similarly, an allowance may be made to the mother, after the father's death, in a proper case.¹⁵

The fact that the parents have been divorced does not necessarily terminate the liability of the father for the support of his minor children. In some cases the decree makes provision in express terms for both the custody and the support of the children, and in such cases, of course, the decree will settle the question of support.¹⁶ But where the decree makes no provision for

¹¹ 21 Am. & Eng. Enc. Law (2d Ed.) 1050; *Gilley v. Gilley*, 79 Me. 292, 1 Am. St. Rep. 307, *Woodruff Cas.* 269; *Gleason v. Boston*, 144 Mass. 25.

¹² 21 Am. & Eng. Enc. Law (2d Ed.) 1050. See cases cited in note 15, *infra*.

¹³ See post, § 169.

¹⁴ 21 Am. & Eng. Enc. Law (2d Ed.) 1051; *Watts v. Steele*, 19 Ala. 556, *Woodruff Cas.* 656; *Myers v. Myers*, 2 McCord (S. C.) 214, 16 Am. Dec. 648, and note; *Evans v. Pearce*, 15 Grat. (Va.) 513, 78 Am. Dec. 635.

¹⁵ *Pitts v. Rhode Island Hospital Trust Co.*, 21 R. I. 544, 45 Atl. 553, 48 L. R. A. 783; *Pierce v. Pierce*, 64 Wis. 72, 54 Am. Rep. 581.

¹⁶ See ante, § 145.

alimony or custody, it is well settled that the father is still bound to support his children, even though they may actually be in the custody of the mother.¹⁷ The authorities are in conflict as to whether the father is liable for the support of the children where the decree awards their custody to the mother, but is silent as to their support. On principle it would seem that the mother, and not the father, should be liable in such case, for she, and not he, has the right to the custody and services of the children; and, moreover, in a proper case, an express provision requiring him to support the children would, upon her application, be embodied in the decree. It has accordingly been held that the father is not liable, at least to the mother herself.¹⁸ It has also been held, however, that, where the divorce has been granted to the mother for the father's fault, he remains liable for the support of the children, although their custody is given to the mother. This is upon the ground that the mere fact that the father has forfeited the right to the custody and services of his children does not relieve him of the duty of supporting them.¹⁹

¹⁷ 9 Am. & Eng. Enc. Law (2d Ed.) 871; Gilley v. Gilley, 79 Me. 292, 1 Am. St. Rep. 307, Woodruff Cas. 269; Zilley v. Dunwiddie, 98 Wis. 428, 74 N. W. 126, 67 Am. St. Rep. 820, 40 L. R. A. 579.

¹⁸ Husband v. Husband, 67 Ind. 583, 33 Am. Rep. 107; Hall v. Green, 87 Me. 122, 47 Am. St. Rep. 311, and note; Brown v. Smith, 19 R. I. 319, 33 Atl. 466, 30 L. R. A. 680. See, also, Ramsey v. Ramsey, 121 Ind. 215, 23 N. E. 69, 6 L. R. A. 682; Foss v. Hartwell, 168 Mass. 66, 46 N. E. 411, 37 L. R. A. 589.

¹⁹ Keller v. St. Louis, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391; Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. Rep. 542; Ditmar v. Ditmar, 27 Wash. 13, 67 Pac. 353, 91 Am. St. Rep. 817. But the father is not liable to the mother where the

It should be noted that the question just considered almost always arises between the father and the mother—the mother seeking to recover from the father for support furnished by her to the children. It would seem clear that in practically any case the mother, having the right to the custody and control of the children, should be liable to third persons for their support.

§ 154. Same—Nature of duty as moral or legal.

There is some difference of opinion as to the exact nature of the duty of support. It is universally recognized as being at least a moral duty, but the authorities are not harmonious as to whether or not it is also a legal duty. In England by the statute of 43 Elizabeth, and in this country by similar statutes known as the “poor laws,” the duty of support has been affirmed and extended, and provision made for its enforcement. These statutes, however, are for the protection of the public, in order to prevent children from becoming a public charge, and they cannot ordinarily be invoked for the benefit of the child. They therefore do not necessarily render the duty of support in general a legal duty, but its nature must be determined by the common law.²⁰ In England and in some of the American states the duty is declared to be a moral duty merely.²¹ But by the weight of American authority it is held that a father is legally bound to support his minor children if able

divorce was granted to him for her misconduct. *Fulton v. Fulton*, 52 Ohio St. 229, 39 N. E. 729, 49 Am. St. Rep. 720, 29 L. R. A. 678.

²⁰ 1 Bl. Comm. 448; 1 Stimson's Am. St. Law, § 6608; 22 Am. & Eng. Enc. Law (2d Ed.) 1013-1015.

²¹ See cases cited in note 24, *infra*.

to do so, although they may have property of their own.²²

It should be noted that the declarations of the courts as to the nature of the duty of support are largely *dicta*, and are generally unnecessary to the decisions actually rendered. Our statements of the law, therefore, should be based upon what the courts have actually decided, rather than upon what they have said.^{22a}

The importance of the distinction here made will become manifest when we consider in the next section the liability of a father for necessities furnished to his child by a third person.

§ 155. Same—Liability for necessities.

The duty of support is ordinarily enforced indirectly by permitting a third person, who has supplied the child with necessities, to recover therefor from the father. But a father cannot be held liable for necessities furnished to his child except upon a contract, or its equivalent, to pay for them. This contract may be made (1) by the father himself; (2) by the child as the

²² See cases cited in note 25, *infra*. We have already seen that the husband's duty to support the wife is a legal duty, and not a mere moral obligation. On principle it would seem that the duty of supporting children should be governed by precisely the same rules, and this we find to be the case, in this country at least, notwithstanding the dictum of Maule, J., in *Shelton v. Springett*, 11 C. B. 452, 73 E. C. L. 452, that "people are very apt to imagine that a son stands in this respect upon the same footing as a wife; but that" is not so."

^{22a} It is somewhat customary to speak of the cases on this subject as being in a state of confusion and contradiction. This is true so far as the language employed by the courts is concerned, but there is little conflict in the actual decisions rendered.

father's agent; or (3) by the law. Where the father has promised to pay for support or necessities furnished the child, or where he has authorized the child to contract therefor on his behalf, he is plainly liable, and such promise or authority may be either express or implied. Where the promise or authority is express there is, of course, no difficulty in holding the father liable; and this is generally true where such promise or authority may be implied from other circumstances than the mere relationship of the parties.²³ Such agreements by the father, whether express or implied, are governed by the ordinary law of contracts. But where the father has neither expressly nor by implication contracted for the necessities, nor authorized his child so to contract, and the sole ground of his liability is his relationship to the child and his failure to provide for his wants, it is a question whether the law will make such contract for him and hold him liable thereon. The determination of this question will depend, in theory, upon the nature of the duty of support, as moral or legal. If the duty be merely moral the law will not enforce it, and the father cannot be held liable in the absence of an express promise or authority, or of circumstances, other than the mere relationship, from which such promise or authority may be inferred. In England and a few American states, as already stated, the duty is declared to be merely moral, and hence not a sufficient basis for a contract implied by law. It seems, however, that

²³ See 21 Am. & Eng. Enc. Law (2d Ed.) 1052; *Murphy v. Ottenheimer*, 84 Ill. 39, 25 Am. Rep. 424; *Vancleave v. Clark*, 118 Ind. 61, 20 N. E. 527, 3 L. R. A. 519; *Lamson v. Varnum*, 171 Mass. 237.

there has been no case in which this precise question has been squarely presented. The cases in which the liability of the father was denied on the ground that his duty was a mere moral obligation present facts sufficient to establish his nonliability, whether the duty be regarded as legal or moral, as, for example, that the father had already performed his duty, or that the articles furnished were not necessities, or that the child had forfeited his right to support, or was emancipated.²⁴

If the duty be regarded as legal, the father may be held liable, where he has neglected his duty, upon the mere promise implied by the law. The American courts are practically unanimous in holding that, where the father neglects his duty to furnish support and necessities to his infant children, and their wants are supplied by others, the law will imply a promise on his part to pay for such necessities, or authority in the child to contract therefor. In so holding, the courts do not always refer to the nature of the father's duty as legal or moral, but the effect of the decision is, of course, that the duty is legal. Of course the amount for which the father is liable is the reasonable value of the service or necessities, and not the charge made therefor by the plaintiff.²⁵

²⁴ Such cases are *Mortimer v. Wright*, 6 Mees. & W. 486; *Shelton v. Springett*, 11 C. B. 452, 73 E. C. L. 452, 20 Eng. L. & Eq. 281; *Hunt v. Thompson*, 4 Ill. 179, 36 Am. Dec. 538; *Kelley v. Davis*, 49 N. H. 187, 6 Am. Rep. 499, *Woodruff Cas.* 257; *Holt v. Baldwin*, 46 Mo. 265, 2 Am. Rep. 515; *Freeman v. Robinson*, 38 N. J. Law, 383, 20 Am. Rep. 399; *Gordon v. Potter*, 17 Vt. 443; *Jackson v. Mull*, 6 Wyo. 55, 42 Pac. 603.

²⁵ 21 Am. & Eng. Enc. Law (2d Ed.) 1054; *Owen v. White*, 5 Port.

But persons supplying the wants of the child do so at their peril. Where the child is living at home or is under the father's control, the father has the right to decide what is sufficient for him, and how and when it shall be procured, and there must be a clear and palpable omission of his duty in this respect to authorize another to act for and charge the expense to him. And the articles furnished must be necessities. What are necessities will depend largely upon the situation of the child. It seems that the father should be held liable only where the service rendered or supplies furnished were absolutely necessary to relieve the child from actual want.²⁶

§ 156. Same—Where child is not living with parent.

Where the child is living away from home, the question of the father's liability for his support will depend upon the circumstances of the case. If the child leaves home voluntarily and remains away against the will and without the fault of the father, he forfeits his right to support, and the father cannot be held liable therefor, especially where there has been no neglect of duty on his part.²⁷ But the father is liable where he abandons the child, or drives him away from home by cruel

(Ala.) 435, 30 Am. Dec. 572; Porter v. Powell, 79 Iowa, 151, 44 N. W. 295, 18 Am. St. Rep. 353, 7 L. R. A. 11; Van Valkinburgh v. Watson, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395, Woodruff Cas. 265; Matter of Ryder, 11 Paige (N. Y.) 185, 42 Am. Dec. 109.

²⁶ See Peacock v. Linton, 22 R. I. 328, 47 Atl. 887, 53 L. R. A. 192, and cases cited in note immediately preceding.

²⁷ Hunt v. Thompson, 4 Ill. 179, 36 Am. Dec. 538; Angel v. McLellan, 16 Mass. 28, 8 Am. Dec. 119; Raymond v. Loyl, 10 Barb. (N. Y.) 488. See, also, Carney v. Barrett, 4 Or. 171, Woodruff Cas. 268.

treatment. In such case his liability depends upon the fact that he is in fault.²⁸ So, also, the father may be held liable for the support of his minor children where a divorce has been granted to the mother for the father's misconduct, and the children are living with the mother.²⁹ If the child is away from home with the father's consent, in circumstances not amounting to emancipation, the father is liable for his support to the same extent as if the child were at home.³⁰ If the child is emancipated, the father is not liable for his support.³¹

§ 157. Duty of protection.

The duty of protection is rather permitted than enjoined by any municipal laws, "nature, in this respect, working so strongly as to need rather a check than a spur." A parent may justify an assault and battery in defense of his child, but the right to protect does not include the right to punish for an injury already inflicted.³²

²⁸ *Stanton v. Wilson*, 3 Day (Conn.) 37, 3 Am. Dec. 255.

²⁹ See ante, § 153.

³⁰ 21 Am. & Eng. Enc. Law (2d Ed.) 1056; *Cooper v. McNamara*, 92 Iowa, 243, 60 N. W. 522, *Woodruff Cas.* 266. It would seem, in this case, that the child would have implied authority from the parent to procure necessities not furnished by the latter.

³¹ *Varney v. Young*, 11 Vt. 258. See post, § 167.

³² 1 Bl. Comm. 450; 21 Am. & Eng. Enc. Law (2d Ed.) 1057; *Campbell v. Com.*, 88 Ky. 402, 21 Am. St. Rep. 348; *Com. v. Malone*, 114 Mass. 295. The duty of a parent to protect his child and shield him from danger is frequently recognized in actions to recover for injuries to children through the negligence of third persons. In such cases, however, the only bearing the existence of such a duty has in the action is in connection with the question of the parent's contributory negligence, the effect of the duty being to protect the defendant from liability, rather than to benefit the child. See John-

§ 158. Duty of education.

The duty of a parent to educate his child is generally recognized as a moral duty, but it is not enforceable at common law.³³ There is very little law on the subject of this parental duty, the matter being rarely brought to the attention of the courts. In this country the duty of educating children is usually discharged by the state under the public school system, leaving the parent free to discharge it himself if he wishes and is able to do so.^{33a}

§ 159. Liability to third persons for torts of child.

A father is not liable for the torts of his child committed without his knowledge, consent, participation; or

son v. Reading City Pass. R. Co., 160 Pa. 647, 28 Atl. 1001, 40 Am. St. Rep. 752, and post, § 164.

³³ 1 Bl. Comm. 450; 2 Kent, Comm. 195. See *Peacock v. Linton*, 22 R. I. 328, 47 Atl. 887, 53 L. R. A. 192; *Heninger v. Heninger*, 90 Va. 271, 18 S. E. 193, Woodruff Cas. 236. In *Re Ryder*, 11 Paige (N. Y.) 185, 42 Am. Dec. 109, it was held that a son twenty years old, in good health, could not, in a court of equity, compel his mother to furnish him with the means of obtaining a professional education, whatever might be the amount of her property.

In England it is held in numerous cases that as between father and mother, when of different religions, the father may determine the religious education of the children. 21 Am. & Eng. Enc. Law (2d Ed.) 1057. This question seems not to have arisen in the United States, but it has been held that, although a father has the right, in general, to direct the religious education of his child, he cannot interfere with or control the child's rights of conscience in religious matters, where the child has arrived at the age of discretion. *Com. v. Armstrong*, 1 Pa. Law J. 393; *Com. v. Sigman*, 3 Pa. Law J. 252.

^{33a} As to public schools, see 25 Am. & Eng. Enc. Law (2d Ed.) 4. The compulsory education statutes have been held constitutional. *State v. Bailey*, 157 Ind. 324, 61 N. E. 730, 59 L. R. A. 435; *State v. Jackson*, 71 N. H. 552, 53 Atl. 1021, 60 L. R. A. 739.

sanction, and not in the course of his employment of the child. But where a child commits a tort while engaged in his father's service, within the scope of his employment, or with the knowledge or consent of the father, the father is liable.³⁴

³⁴Schouler, Dom. Rel. § 263; 21 Am. & Eng. Enc. Law (2d Ed.) 1057; notes in 50 Am. Rep. 383, and 74 Am. St. Rep. 801; Hagerty v. Powers, 66 Cal. 368, 56 Am. Rep. 101; Teagarden v. McLaughlin, 86 Ind. 476, 44 Am. Rep. 332; Smith v. Davenport, 45 Kan. 423, 25 Pac. 851, 23 Am. St. Rep. 737, 11 L. R. A. 429; Meers v. McDowell, 110 Ky. 926, 62 S. W. 1013, 53 L. R. A. 789; Carmonche v. Bonis, 6 La. Ann. 95, 54 Am. Dec. 558; Maddox v. Brown, 71 Me. 432, 36 Am. Rep. 336; Chaddock v. Plummer, 88 Mich. 225, 50 N. W. 135, 26 Am. St. Rep. 283; Baker v. Haldeman, 24 Mo. 219, 69 Am. Dec. 430; Paul v. Hummel, 43 Mo. 119, 97 Am. Dec. 381, Woodruff Cas. 282; Johnson v. Glidden, 11 S. D. 237, 76 N. W. 933, 74 Am. St. Rep. 795; Andrus v. Howard, 36 Vt. 248, 84 Am. Dec. 680; Hoverson v. Noker, 60 Wis. 511, 50 Am. Rep. 381, Woodruff Cas. 283; Schaefer v. Osterbrink, 67 Wis. 495, 58 Am. Rep. 875; Harris v. Cameron, 81 Wis. 239, 51 N. W. 437, 29 Am. St. Rep. 891.

CHAPTER IX.

THE RIGHTS OF PARENTS.

§ 160. In General.

161. Right to Custody and Control of Child.

162. Right to Child's Services.

163. Right to Child's Property.

164. Right to Recover for Injuries to Child.

§ 160. In general.

A parent, as such, has certain legal rights with respect to his child, which, in a measure, compensate him for discharging the duties and liabilities which we have just considered. It should be noted, however, that the relation of parent and child, so far as the legal benefits growing out of it are concerned, is a relation principally for the benefit of the child. In this respect it differs from the relation of husband and wife and most of the other legal relations, which are usually for the benefit of both parties. Even the rights of parents exist for the benefit of the child, and, as a rule, the exercise of a parental right is in fact the discharge of a parental duty. As has been said: "The exercise of parental authority is not necessarily for the profit of the parent, but for the advantage of the child; the duty of service by the child, being deemed necessary to the proper exercise of parental authority, for its own good. Although we still recognize the right of the father to the personal services of his children, that right is simply incidental to the duty of the father to discipline and

direct them. His right to personal custody and personal service is secured to him, therefore, in order that, through them, prompted by natural affection, he may successfully impart to them habits of industry, methods of thrift, and the means of personal success in life."³⁵

The recognized rights of parents are the right to the custody and control of the child, the right to the child's services, and a limited right to recover for an injury to the child.

§ 161. Right to custody and control of child.

At common law a father has the paramount right to the custody and control of his minor children, this right springing naturally from his duty to maintain, protect, and educate them. But this right is not absolute; it may be forfeited by the father's misconduct. And a court of equity will take a child away from the father when he is an unfit person, and the welfare of the child demands it. The child, in such case, will be given preferably to the mother, if a fit person, or to such other person as the court may approve. In all cases, the welfare of the child is the controlling consideration by which the court is to be guided.³⁶

³⁵ Per Clark, J., in *Beaver v. Bare*, 104 Pa. 58, 49 Am. Rep. 567. See, also, 1 Bl. Comm. 452; 2 Kent, Comm. 203.

³⁶ 21 Am. & Eng. Enc. Law (2d Ed.) 1036; note in 2 Am. St. Rep. 183; *Neville v. Reed*, 134 Ala. 317, 32 So. 659, 92 Am. St. Rep. 35; *Kelsey v. Green*, 69 Conn. 291, 37 Atl. 679, 38 L. R. A. 471; *Miller v. Miller*, 38 Fla. 227, 20 So. 989, 56 Am. St. Rep. 166; *Hussey v. Whiting*, 145 Ind. 580, 44 N. E. 639, 57 Am. St. Rep. 220; *Chapsky v. Wood*, 26 Kan. 650, 40 Am. Rep. 321; *State v. Michel*, 105 La. 741, 30 So. 122, 54 L. R. A. 927; *Corrie v. Corrie*, 42 Mich. 509, *Woodruff Cas* 255; *Norval v. Zinsmaster*, 57 Neb. 158, 77 N. W. 373, 73 Am. St. Rep.

Upon the death of the father, the mother, if she survives, and no testamentary guardian has been appointed, is entitled to the custody of the child. But except where a statute provides otherwise, the right of a testamentary guardian appointed by the father is superior to that of the mother. In some states the mother loses her right of custody by marrying again, but this is not the case in other states;³⁷ and there seems to be no good reason why the mother should lose her right by marrying again, unless, in the particular case, her marriage renders her unable properly to care for the child.

Many cases have come before the courts in which a parent who had by contract surrendered his right to the custody of his minor child sought afterwards to recover possession of the child, in violation of his agreement. The decisions are conflicting as to the validity of such agreements. The weight of American authority is to the effect that such a contract is valid, and will be enforced against the parent, especially when acted upon, unless the welfare of the child would be better promoted by not enforcing it.³⁸ There are able courts,

500; *Richards v. Collins*, 45 N. J. Eq. 283, 17 Atl. 831, 14 Am. St. Rep. 726; *Mercein v. People*, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653, *Woodruff Cas.* 256; *Merritt v. Swimley*, 82 Va. 433, 3 Am. St. Rep. 115; *Kentzler v. Kentzler*, 3 Wash. 166, 28 Pac. 370, 28 Am. St. Rep. 21; *Cunningham v. Barnes*, 37 W. Va. 746, 17 S. E. 308, 38 Am. St. Rep. 57; *Nugent v. Powell*, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17.

³⁷ 21 Am. & Eng. Enc. Law (2d Ed.) 1037; *Moore v. Christian*, 56 Miss. 408, 31 Am. Rep. 375; *In re Van Houten*, 3 N. J. Eq. 220, 29 Am. Dec. 707; *Armstrong v. Stone*, 9 Grat. (Va.) 102; *State v. Reuff*, 29 W. Va. 751, 6 Am. St. Rep. 676. In this case it was held that an agreement by the father, surrendering the right of custody, was not binding on the mother after the father's death.

³⁸ *Bonnett v. Bonnett*, 61 Iowa, 199, 16 N. W. 91, 47 Am. Rep. 810;

however, which hold that such an agreement is contrary to public policy, and void, and is therefore not binding upon the parent, and will not prevent his afterwards regaining the custody of the child from one who has received and cared for it upon the faith of the agreement.³⁹ In the author's judgment, the latter is the true doctrine. The parent does not enjoy the right to the custody of the child solely for his own benefit, but also and principally for the benefit of the child, and he ought not to be permitted to throw off his responsibility to the child by any such contract. All the cases recognize that the welfare of the child is the paramount consideration, and it would seem that, wherever the parent's fitness for the trust is established, it might be found, almost as a matter of law, that the welfare of the child would be best promoted by committing it to the care of the parent. Clearly a parent ought not lightly to be deprived of the custody of his child,⁴⁰ and it is rightly held that no agreement by which this natural right is surrendered will be enforced unless it is clear, dis-

Enders v. Enders, 164 Pa. 266, 30 Atl. 129, 44 Am. St. Rep. 598, 27 L. R. A. 56; *Merritt v. Swimley*, 82 Va. 433, 3 Am. St. Rep. 115; *Stringfellow v. Somerville*, 95 Va. 701, 29 S. E. 685, 40 L. R. A. 623; *Green v. Campbell*, 35 W. Va. 698, 14 S. E. 212, 29 Am. St. Rep. 843; *Cunningham v. Barnes*, 37 W. Va. 746, 17 S. E. 308, 38 Am. St. Rep. 57; *Fletcher v. Hickman*, 50 W. Va. 244, 40 S. E. 371, 38 Am. St. Rep. 862. See notes in 88 Am. St. Rep. 866, and 27 L. R. A. 56.

³⁹ 21 Am. & Eng. Enc. Law (2d Ed.) 1039; *Brooke v. Logan*, 112 Ind. 183, 13 N. E. 669, 2 Am. St. Rep. 177; *Hussey v. Whiting*, 145 Ind. 580, 44 N. E. 639, 57 Am. St. Rep. 220; *Hibbette v. Baines*, 78 Miss. 695, 29 So. 80, 51 L. R. A. 839; *Weir v. Morley*, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672. See, also, *Stapleton v. Poynter*, 111 Ky. 264, 62 S. W. 730, 53 L. R. A. 784.

⁴⁰ *Lovell v. House of Good Shepherd*, 9 Wash. 419, 37 Pac. 660, 43 Am. St. Rep. 839.

tinct, and certain in terms.⁴¹ Of course, an agreement by which a parent consents to the apprenticing or adoption of his child as provided by law is valid.

Upon the divorce of husband and wife, the court may make such decree as it may deem proper as to the custody and maintenance of their minor children.⁴²

The usual mode of enforcing the right to the custody of a child is by *habeas corpus* proceedings.⁴³

A parent has a right to chastise or otherwise punish his child in a reasonable and proper manner for the purpose of discipline and correction; but if, in the exercise of this right, he exceeds the bounds of moderation, and wantonly inflicts cruel, merciless, and unnecessary punishment upon the child, he may be prosecuted criminally therefor.^{43a}

§ 162. Right to child's services.

A father has a right to the services of his minor child unless he has in some way relinquished this right;⁴⁴ and if the child works for another, the father, and not the child, has a right to recover for such services, un-

⁴¹ *Miller v. Wallace*, 76 Ga. 479, 2 Am. St. Rep. 48; *Norval v. Zinsmaster*, 57 Neb. 158, 77 N. W. 373, 73 Am. St. Rep. 500.

⁴² See ante, § 145.

⁴³ See cases cited in notes to this section.

^{43a} 1 Bl. Comm. 452; *Fletcher v. People*, 52 Ill. 395, *Woodruff Cas.* 281; *State v. Washington*, 104 La. 443, 29 So. 55, 81 Am. St. Rep. 141; *State v. Jones*, 95 N. C. 588, 59 Am. Rep. 282; *Johnson v. State*, 2 Humph. (Tenn.) 283, 36 Am. Dec. 322. The parent may delegate to another the power to punish the child. *Rowe v. Rugg*, 117 Iowa, 606, 91 N. W. 903, 94 Am. St. Rep. 318.

⁴⁴ 21 Am. & Eng. Enc. Law (2d Ed.) 1039. See cases cited in notes immediately following, and to sections 164, 167, post.

less the father has otherwise agreed.⁴⁵ This right seems to be allowed as a compensation for the duty of maintenance. The father may waive his right either by permitting the child to contract for and collect his own wages, or by his own failure to provide for the child, thus forcing him to earn his own living.⁴⁶ A father has ordinarily no right to the services of an adult child, but if the child continues to live with and render service to the father, it will ordinarily be presumed that such services were rendered gratuitously, and the child cannot recover therefor, in the absence of a promise to pay for them.⁴⁷ The same rule applies to services rendered by a child to his stepparent,⁴⁸ or to any one else *in loco parentis*.^{48a}

Since a father has a right to his child's services, he may recover damages from anyone who wrongfully deprives him of such services;⁴⁹ and, moreover, since the child's earnings belong to the father, they are subject to the claims of his creditors to the same extent as any

⁴⁵ 21 Am. & Eng. Enc. Law (2d Ed.) 1040; Hunt v. Adams, 81 Me. 356, 17 Atl. 298, 3 L. R. A. 608; Bishop v. Shepherd, 23 Pick. (Mass.) 492, Woodruff Cas. 273. A father may make contracts hiring his child to another. New v. Southern R. Co., 116 Ga. 147, 42 S. E. 391, 59 L. R. A. 115.

⁴⁶ Cloud v. Hamilton, 11 Humph. (Tenn.) 104, 53 Am. Dec. 778, Woodruff Cas. 275. See post, § 167.

⁴⁷ 21 Am. & Eng. Enc. Law (2d Ed.) 1061; Zimmerman v. Zimmerman, 129 Pa. 229, 15 Am. St. Rep. 720.

⁴⁸ Harris v. Smith, 79 Mich. 54, 44 N. W. 169, 6 L. R. A. 702; Ellis v. Cary, 74 Wis. 176, 42 N. W. 252, 17 Am. St. Rep. 125. See post, § 169.

^{48a} Murphy v. Murphy, 1 S. D. 316, 47 N. W. 142, 9 L. R. A. 820; Hall v. Finch, 29 Wis. 278, 9 Am. Rep. 559.

⁴⁹ Lawyer v. Fritcher, 130 N. Y. 239, 29 N. E. 267, 27 Am. St. Rep. 521; Gulf, etc., R. Co. v. Redeker, 75 Tex. 310, 12 S. W. 855, 16 Am. St. Rep. 887. See post, § 164.

of his other property,⁵⁰ though, of course, the creditor could not force the debtor to work himself, or make his children work, to pay the debt.⁵¹

Where the father is dead, or the parents have been divorced, and the custody of the children awarded to the mother, the mother succeeds to the father's right to the children's services.⁵² So, also, a person standing *in loco parentis* is entitled to the child's services.^{52a}

§ 163. Right to child's property.

A parent, as such, has no interest in or right to property belonging to the child, and cannot in any way control, manage, or dispose of it. If, therefore, the father of a child owning property wishes to manage or deal with such property in any way, it will be necessary for him first to be duly constituted guardian of the child,

⁵⁰ *Godfrey v. Hays*, 6 Ala. 501, 41 Am. Dec. 58; *Stumough v. Anderson*, 46 Kan. 541, 26 Pac. 1045, 26 Am. St. Rep. 121; *Schuster v. Bauman Jewelry Co.*, 79 Tex. 179, 15 S. W. 259, 23 Am. St. Rep. 327. But the father may emancipate the son, giving him a right to his own earnings, and in such case the son's earnings are not subject to the claims of the father's creditors. See post, § 167.

⁵¹ See *Halliday v. Miller*, 29 W. Va. 424, 1 S. E. 821, 6 Am. St. Rep. 653.

⁵² 21 Am. & Eng. Enc. Law (2d Ed.) 1042; *Matthewson v. Perry*, 37 Conn. 435, 9 Am. Rep. 339; *Horgan v. Pacific Mills*, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504, *Woodruff Cas.* 285; *Hammond v. Corbett*, 50 N. H. 501, 9 Am. Rep. 288; *Fulton v. Fulton*, 52 Ohio St. 229, 39 N. E. 729, 49 Am. St. Rep. 720, 29 L. R. A. 678. See cases cited in note 64, § 164, post. Some authorities allow the mother the right to the child's wages only while the child remains a member of her family and is supported by her. *Hollingsworth v. Swedenborg*, 49 Ind. 378, 19 Am. Rep. 687.

^{52a} *Clark v. Boyer*, 32 Ohio St. 299, 30 Am. Rep. 593. See post, § 169.

with power as guardian to manage the child's estate.⁵³ Since in this country it is not common for children whose parents are living to own property in their own right, cases in which this doctrine is applied are not of frequent occurrence. It should be added that articles of clothing and the like, given by the father to the child for his support, belong to the father, and he may recover for the loss or injury thereof.⁵⁴

§ 164. Right to recover for injuries to child.

A parent cannot recover for an injury, as such, to the person of his child, since, as we shall hereafter see,⁵⁵ this right belongs to the child; but such injury may give rise to an independent right in favor of the parent. Thus, in the case of personal injury, the parent may recover for the loss of the child's services, and for any expenses for medical attendance, etc., incurred by him in consequence of the injury. This right is based upon the technical relation of master and servant, and not upon that of parent and child. And in England the parent is not allowed to recover if the child was too young to render any service; but in the United States a more liberal rule prevails, and the parent may recover, at least for the expense incurred, although the child's services may be of no substantial value. And

⁵³ 1 Bl. Comm. 453; 21 Am. & Eng. Enc. Law (2d Ed.) 1044; note in 89 Am. St. Rep. 268; *Linton v. Walker*, 8 Fla. 144, 71 Am. Dec. 105; *Shanks v. Seamonds*, 24 Iowa, 131, 92 Am. Dec. 465; *Banks v. Conant*, 14 Allen (Mass.) 497, *Woodruff Cas.* 279.

⁵⁴ *Richardson v. Louisville, etc., R. Co.*, 85 Ala. 559, 5 So. 308, 2 L. R. A. 716; *Dickenson v. Winchester*, 4 Cush. (Mass.) 114, 50 Am. Dec. 760; *Erps v. Hinds*, 27 Miss. 657, 61 Am. Dec. 528.

⁵⁵ See post, § 199.

it is not necessary that services be actually rendered; it is sufficient that the parent has a right to command them.⁵⁶

The rule permitting a recovery by the parent applies with peculiar force to the case of the seduction of an infant daughter, for in such case the daughter herself, being a party to the act, has at common law no right of action.⁵⁷ In this case the theory of an injury to the master in loss of service "is now little more than a legal fiction, used as a peg to hang a substantial award of damages upon as compensation, not to the master, but to the head of the family."⁵⁸ And in some states this legal fiction is abolished by statute, and an action for seduction may be maintained without allegation or proof of loss of service.⁵⁹

The fact that the child is an adult will not defeat the parent's right of action where the child remains in his service.⁶⁰

A parent has, at common law, no right of action for

⁵⁶ 21 Am. & Eng. Enc. Law (2d Ed.) 1044-1049; *Baker v. Flint*, etc., R. Co., 91 Mich. 298, 51 N. W. 897, 30 Am. St. Rep. 471, 16 L. R. A. 154; *Texas, etc., R. Co. v. Brick*, 83 Tex. 526, 18 S. W. 947, 29 Am. St. Rep. 675; *Holdridge v. Mendenhall*, 108 Wis. 1, 33 N. W. 1109, 81 Am. St. Rep. 871, and cases cited in notes immediately following.

⁵⁷ 25 Am. & Eng. Enc. Law (2d Ed.) 193; notes in 44 Am. Dec. 162, and 76 Am. St. Rep. 659; *Blagge v. Ilsley*, 127 Mass. 191, 34 Am. Rep. 361; *Lawyer v. Fritcher*, 130 N. Y. 239, 29 N. E. 267, 27 Am. St. Rep. 521; *Davidson v. Abbott*, 52 Vt. 570, 36 Am. Rep. 767.

⁵⁸ *Simpson v. Grayson*, 54 Ark. 404, 26 Am. St. Rep. 52.

⁵⁹ See *Anthony v. Norton*, 60 Kan. 341, 56 Pac. 529, 44 L. R. A. 757.

⁶⁰ *Anthony v. Norton*, 60 Kan. 341, 56 Pac. 529, 44 L. R. A. 757; *Davidson v. Abbott*, 52 Vt. 570, 36 Am. Rep. 767.

the death of a child, but such right is generally given by statute.⁶¹

If the parent's own negligence contributed to the injury, his right of action is thereby defeated, unless the injury was caused by the wanton, reckless, or willful negligence of the defendant.⁶² So, also, the contributory negligence of the child will defeat the parent's action.⁶³

Where the mother has a right to the child's services, as, for example, where the father is dead, she may recover for an injury to the child, as the father might have done.⁶⁴

⁶¹ 8 Am. & Eng. Enc. Law (2d Ed.) 891; note in 41 L. R. A. 807; *Fox v. Oakland Consolidated St. R. Co.*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; *Atlanta, etc., R. Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550, 44 Am. St. Rep. 145, 26 L. R. A. 553; *Gulf, etc., R. Co. v. Beall*, 91 Tex. 310, 42 S. W. 1054, 41 L. R. A. 807.

⁶² *Pratt Coal, etc., Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751; *Westerberg v. Kinzua Creek, etc., R. Co.*, 142 Pa. St. 471, 21 Atl. 878, 24 Am. St. Rep. 510; *Western Union Tel. Co. v. Hoffman*, 80 Tex. 420, 15 S. W. 1048, 26 Am. St. Rep. 759. It is not negligence per se for parents to permit their infant children to be upon city streets unattended. *Fox v. Oakland Consolidated St. R. Co.*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; *Holdridge v. Mendenhall*, 108 Wis. 1, 83 N. W. 1109, 81 Am. St. Rep. 871.

⁶³ See *Pratt Coal, etc., Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751; *Holdridge v. Mendenhall*, 108 Wis. 1, 83 N. W. 1109, 81 Am. St. Rep. 871.

⁶⁴ *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Anthony v. Norton*, 60 Kan. 341, 56 Pac. 529, 44 L. R. A. 757; *County Commissioners v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739; *Horgan v. Pacific Mills*, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504, *Woodruff Cas.* 285; *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441. A divorced wife, having custody of her child, cannot recover for an injury to the child while the father is still charged with the duty of supporting it. *Keller v. St. Louis*, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391.

CHAPTER X.

CERTAIN MISCELLANEOUS MATTERS.

- § 165. Duties of Child to Parent.
- 166. Transactions Between Parent and Child.
- 167. Emancipation of Child.
- 168. Illegitimate Children.
- 169. Stepchildren.

§ 165. Duties of child to parent.

The duties which children owe to their parents are for the most part moral duties merely. They are described by Blackstone as follows: "The duties of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence we naturally owe subjection and obedience during our minority, and honor and reverence ever after. They who protected the weakness of our infancy are entitled to our protection in the infirmity of their age. They who, by sustenance and education, have enabled their offspring to prosper, ought in return to be supported by that offspring in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents which are enjoined by positive laws."⁶⁵ So, also, Chancellor Kent says: "The duties that are enjoined upon children to their parents are obedience and assistance during their own minor-

⁶⁵ 1 Bl. Comm. 453.

ity, and gratitude and reverence during the rest of their lives. This, as well as the other primary duties of domestic life, have generally been the object of municipal law."⁶⁶ As pointed out by these authors, the filial duties of obedience and maintenance were enforced under the laws of some of the ancient states, but by our law they are regarded as moral, rather than as legal, duties. At common law, a child is not liable for the support of an infirm and indigent parent,⁶⁷ but under the various poor laws, enacted for the benefit of the public to prevent such persons from becoming a public charge, children may, in some cases, be compelled to support their parents.⁶⁸ The duty of obedience, which by the Jewish law was enforced by punishing disobedience with death,⁶⁹ is recognized by our law only to the extent that a parent is permitted to punish his child to a reasonable extent for disobedience.⁷⁰

§ 166. Transactions between parent and child.

A parent and his child are under no legal disability, so far as contracts or other dealings with each other are concerned, by reason of their relationship alone.

⁶⁶ 2 Kent, Comm. 207.

⁶⁷ *Rex v. Munden*, 1 Strange, 190; *Edwards v. Davis*, 16 Johns. (N. Y.) 281. A father's promise to pay his adult son for keeping him creates a valid debt. *Harris v. Orr*, 46 W. Va. 261, 33 S. E. 257, 76 Am. St. Rep. 815. See, also, *Glocke v. Glocke*, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458.

⁶⁸ See 22 Am. & Eng. Enc. Law (2d Ed.) 1015; *Condon v. Pomroy-Grace*, 73 Conn. 607, 48 Atl. 756, 53 L. R. A. 696; *McCook County v. Kammos*, 7 S. D. 558, 64 N. W. 1123, 58 Am. St. Rep. 854, 31 L. R. A. 461.

⁶⁹ Deut. 21:18.

⁷⁰ See ante, § 160.

The legal fiction of identity of person and the presumption of coercion which, at common law, prevent direct dealings between husband and wife, have no application to the case of parent and child. So far as the question of legal capacity is concerned, a father may contract with his own child as well as with the child of another. The child, of course, is under the disability of infancy during his minority, but, with this qualification, he is capable of making valid contracts with his father as well as with a stranger. At the same time, transactions between parent and child do not stand upon precisely the same footing as transactions between an adult and an infant who are not so related. Parent and child sustain towards each other a relation of trust and confidence, and the courts are careful to see that in their contracts or other dealings with each other this confidence is not abused. If in their dealings with each other, the stronger party—who is usually, though not always, the father—gains some advantage over the weaker party, by the exercise of undue influence, the transaction will be set aside.⁷¹ Subject to the foregoing qualifications, contracts or other transactions between parent and child are valid and binding. Thus, a father may make a gift to his child;⁷² or the child may make a gift to his parent;⁷³ or the father may agree that the child shall have the right to his own earnings.⁷⁴

⁷¹ See 29 Am. & Eng. Enc. Law (2d Ed.) 131-134; Bispham, Princ. Eq., § 235; Eaton, Eq., 328. Contracts and gifts between parent and child must be clearly proved. *Poorman v. Kilgore*, 26 Pa. 365, 67 Am. Dec. 425.

⁷² 14 Am. & Eng. Enc. Law (2d Ed.) 1034.

⁷³ 14 Am. & Eng. Enc. Law (2d Ed.) 1036.

⁷⁴ See post, § 167.

§ 167. Emancipation of child.

Emancipation is the setting free of a child from the custody and control of his parent, giving him the right to his own earnings, and relieving the parent of the duty of supporting him. It may be effected in several ways:

(1) *By the child's attaining his majority.* This is the usual way in which children become emancipated. Emancipation is necessarily an incident to the child's becoming fully *sui juris*.⁷⁵

(2) *By the enlistment of the infant in the military or naval service.* During such service the child is necessarily emancipated, and pay, bounties, etc., earned by him in the service belong to him, and not to the parent.⁷⁶

(3) *By marriage.* The marriage of an infant daughter, although without the parent's consent, operates as an emancipation.⁷⁷ The marriage of an infant son with the parent's consent also has this effect. And even if he marries without such consent, he is entitled to his earnings so far as they are necessary for his own support and that of his wife and children, if, indeed, he be not completely emancipated.⁷⁸

⁷⁵ 1 Bl. Comm. 453. As to when an infant becomes of age, see post, § 189.

⁷⁶ Halliday v. Miller, 29 W. Va. 424, 6 Am. St. Rep. 653; note in 18 Am. St. Rep. 639.

⁷⁷ Hewey v. Moseley, 7 Gray (Mass.) 479, 66 Am. Dec. 515; State v. Lowell, 78 Minn. 166, 80 N. W. 877, 79 Am. St. Rep. 358, 46 L. R. A. 440; Aldrich v. Bennett, 63 N. H. 415, 56 Am. Rep. 529.

⁷⁸ Com. v. Graham, 157 Mass. 73, 31 N. E. 706, 34 Am. St. Rep. 255, Woodruff Cas. 276. Contra, White v. Henry, 24 Me. 531.

(4) *By consent of parent.* This is the usual form of emancipation as the term is commonly understood. It is well settled that a parent may by agreement emancipate his minor child for the whole or any part of the remaining period of his minority. Such emancipation may be by parol or in writing, and it may be express or inferred from circumstances. A parol emancipation, however, is revocable by the father, though a revocation does not affect the child's right to his earnings before revocation. The fact that the father is in debt, or even insolvent, does not affect his right to emancipate his child, though the rights of his creditors to the child's future earnings are thereby defeated.⁷⁹ The emancipation may be absolute and complete, or conditional or partial.⁸⁰ And a father may so far emancipate his child as to give him a right to his own earnings, and still remain liable to third persons for actual necessities furnished to him.⁸¹

(5) *By parent's failure to provide for child.* While a parent who abandons, drives away or neglects to pro-

⁷⁹ *Atwood v. Holcomb*, 39 Conn. 270, 12 Am. Rep. 386; *Wilson v. McMillan*, 62 Ga. 16, 35 Am. Rep. 115, and note, *Woodruff Cas.* 277; *Wodell v. Coggeshall*, 2 Metc. (Mass.) 89, 35 Am. Dec. 391; *Flynn v. Baisley*, 35 Or. 268, 57 Pac. 908, 76 Am. St. Rep. 495, 45 L. R. A. 645; *Beaver v. Bare*, 104 Pa. 58, 49 Am. Rep. 567; *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865; *Penn v. Whitehead*, 17 Grat. (Va.) 503, 94 Am. Dec. 478; *Halliday v. Miller*, 29 W. Va. 424, 1 S. E. 821, 6 Am. St. Rep. 653; *Trapnell v. Conklyn*, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30.

⁸⁰ *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865. See, also, *Baker v. Flint, etc.*, R. Co., 91 Mich. 298, 51 N. W. 897, 30 Am. St. Rep. 471.

⁸¹ *Porter v. Powell*, 79 Iowa, 151, 44 N. W. 295, 18 Am. St. Rep. 353, 7 L. R. A. 11.

vide for his child does not thereby relieve himself of the duty to support the child,⁸² he forfeits his right to the child's services, and the child so treated has a right to support himself by his own exertions. In such a case it may be said that the father, by his conduct, has consented to the emancipation of the child, and so lost the right to the child's services, while the child, not having given his consent, has still a legal claim upon the father for support.⁸³

It should be noted that emancipation, except when by the attainment of majority, does not remove the disabilities of infants, but merely frees them from parental control, and gives them a right to their own earnings.⁸⁴

§ 168. Illegitimate children.

An illegitimate child is one that is not legitimate; that is, at common law, one neither begotten nor born in lawful wedlock.⁸⁵

The principal, if not the only, duty of parents towards their bastard children, is that of maintenance. At common law, this duty devolves upon the mother, the putative father of a bastard not being bound to support it. But both in England and in many of the states

⁸² See ante, § 156.

⁸³ 21 Am. & Eng. Enc. Law (2d Ed.) 1042; *McCarthy v. Boston*, etc., R. Co., 148 Mass. 550, 2 L. R. A. 608.

⁸⁴ Note in 18 Am. St. Rep. 637; *Com. v. Graham*, 157 Mass. 73, 31 N. E. 706, 34 Am. St. Rep. 255, *Woodruff Cas.* 276; *Montoya de Antonio v. Miller*, 7 N. M. 289, 34 Pac. 40, 21 L. R. A. 699.

⁸⁵ 1 Bl. Comm. 454. See ante, §§ 148, 150; *Smith v. Perry*, 80 Va. 563.

in this country provision is made by statute for compelling the putative father to support his child.⁸⁶

The mother of a bastard, as its natural guardian, has a right to its custody and control, though the putative father, as against any one but the mother, or after the mother's death, has this right.⁸⁷

The rights of a bastard are few, being only such as he can acquire. Being the son of no one (*filius nullius* or *filius populi*), and of kin to no one, he can neither inherit nor have heirs, except those of his own body. But this disability has been generally modified by statute in this country so as permit a bastard to inherit from and transmit inheritance through the mother. A bastard may at common law take property by will. A bastard has no surname by inheritance, even from his mother, but he may gain one by reputation. In this country a bastard is under no other disability than that of taking by inheritance.⁸⁸

§ 169. Stepchildren.

A stepfather, as such, stands upon precisely the same footing as a stranger so far as legal rights and duties in respect to his stepchildren are concerned. That is

⁸⁶ 1 Bl. Comm. 458; 3 Am. & Eng. Enc. Law (2d Ed.) 889.

⁸⁷ 2 Kent, Comm. 215; 3 Am. & Eng. Enc. Law (2d Ed.) 888; Marshall v. Reams, 32 Fla. 499, 14 So. 95, 37 Am. St. Rep. 118; Dalton v. State, 6 Blackf. (Ind.) 357, Woodruff Cas. 291.

⁸⁸ 1 Bl. Comm. 459; 2 Kent, Comm. 212; 3 Am. & Eng. Enc. Law (2d Ed.) 891; note in 12 Am. St. Rep. 101; Hicks v. Smith, 94 Ga. 812, 22 S. E. 153, Woodruff Cas. 290; Johnstone v. Taliaferro, 107 Ga. 6, 32 S. E. 931, 45 L. R. A. 95; Hudnall v. Ham, 183 Ill. 486, 56 N. E. 172, 75 Am. St. Rep. 124; McDonald v. Pittsburgh, etc., R. Co., 144 Ind. 459, 43 N. E. 447, 55 Am. St. Rep. 185, 32 L. R. A. 309; Moore v. Moore, 169 Mo. 432, 69 S. W. 278, 58 L. R. A. 451.

to say, he owes them no legal duty, and has no legal rights in connection with them. He is not bound to support them, and is not entitled to their custody or services. But he may assume towards them the character of a parent, and in such case he is substantially under the obligations and entitled to the rights of a parent. Thus, a stepfather who receives his stepchild into his home, and holds him out to the world as a member of his family, is under the same liability for his support as for that of his own children, and he cannot recover from the child for its support, in the absence of an express contract with the child's guardian for compensation therefor. No such contract will be implied from the mere fact that the stepfather has supported the child. On the other hand, in such case, the stepfather has a corresponding right to the child's services, and the child cannot recover for services rendered to the stepfather, in the absence of an express contract for compensation. Where the relation of master and servant exists between stepfather and stepchild, the former may recover for an injury to the child resulting in loss of services, but he can recover for such injury only where he has a right to the child's services.⁸⁹

⁸⁹ See 21 Am. & Eng. Enc. Law (2d Ed.) 1043, 1050; note in 53 Am. Dec. 345; *Gerdes v. Weiser*, 54 Iowa, 591, 36 Am. Rep. 256n; *Smith v. Rogers*, 24 Kan. 140, 36 Am. Rep. 254, *Woodruff Cas.* 306; *Freto v. Brown*, 4 Mass. 675, *Woodruff Cas.* 305; *Williams v. Hutchinson*, 3 N. Y. 312, 53 Am. Dec. 301; *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338; *Ellis v. Cary*, 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55. See, also, ante, § 162, note 48. Statutes giving a right of action for death of parent or child do not apply to stepparents and stepchildren. *Marshall v. Macon Sash, etc., Co.*, 103 Ga. 725, 30 S. E. 571, 41 L. R. A. 211; *Hennessy v. Bavarian Brewing Co.*, 145 Mo. 104, 46 S. W. 966, 41 L. R. A. 385.

PART III.

GUARDIAN AND WARD.

CHAPTER XI.

IN GENERAL.

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§ 170. In general.

A guardian is one to whom the law intrusts the care of the person or property, or both, of another, who, on account of youth, inexperience, mental weakness, or for

other reason, is incapable of acting for himself. The person for whom the guardian so acts is called the ward. Guardianship is the relation of guardian and ward. The ward may be an insane person, a spendthrift, a married woman, or a person under age. We shall consider only the case of infant wards.

Guardians are usually appointed for infants upon the death of their fathers, whose place, in a measure, the guardians are intended to supply. Guardianship may exist, however, during the life of the parents, where the infant owns property in his own right.

Guardianship may apply to the person of the ward, or to his estate, or to both person and estate. Where the guardianship extends to both person and estate, the same person may be guardian of both, but this is not necessarily or always the case. An infant may have one guardian as to his person and another as to his estate.

A guardian of the person of the ward is in effect a "temporary parent," and the relation between him and the ward is quite similar to that of parent and child. The principles governing the relation of parent and child apply to a considerable extent to that of guardian and ward, though there are important differences between the two relations. A guardian of the estate of the ward is essentially a trustee, and to such a guardianship the law of trusts, in the main, applies.

Our discussion of the relation of guardian and ward will be brief,—not only because the principles of law applicable to the subject are comparatively few, but also because the subject is generally regulated in the several states by local statutes, a particular examination of

which is beyond the scope of the present work. The law of guardianship as a trust is merely a branch of the subject of equity jurisprudence, and therefore calls for no detailed treatment in the present connection.¹

§ 171. The several kinds of guardianship.

Not less than eleven different kinds of guardianship have been recognized at different times by the English law. Some of these, notably those existing by local custom or growing out of the feudal system, are now obsolete.² We shall note only the most important kinds, namely, guardianship by nature, guardianship for nurture, guardianship in socage, testamentary guardianship, chancery and probate guardianship, guardianship by election of ward, and guardianship *ad litem*.

§ 172. Guardianship by nature and for nurture.

These kinds of guardianship are merely the natural guardianship growing out of the relation of parent and child. The father, and after his death the mother, was guardian by nature of his heir apparent during minority, and guardian for nurture of all the younger children until they reached the age of fourteen. Since in this country all the children inherit equally, the two kinds are here merged into one,—guardianship by nature. The guardianship extends only to the person of the ward, and not to his property. A father (or moth-

¹ See, generally, as to guardian and ward, 1 Bl. Comm. 460; 2 Kent, Comm. 220; Schouler, Dom. Rel. §§ 283-390; 15 Am. & Eng. Enc. Law (2d Ed.) 15; monographic note in 89 Am. St. Rep. 257.

² See Schouler, Dom. Rel. § 284; 15 Am. & Eng. Enc. Law (2d Ed.) 20.

er) has no right, as such, to control or interfere with the property of his infant child.³

It is generally said that only the parents of an infant—first the father, and after his death the mother—can be its natural guardian, but it has recently been held that, after the death of both parents, the grandfather or grandmother, when next of kin, is the guardian by nature.⁴ But a stepfather is not the natural guardian of his stepchild.⁵ The mother is the natural guardian of an illegitimate child.⁶

§ 173. Guardianship in socage.

Guardianship in socage was an incident of the feudal system of land tenures, and arose only where an infant under fourteen years of age inherited real estate held in socage. In such case his next of kin, who could not possibly inherit from him, became his guardian in socage. By appointing as guardian one who could not inherit from the ward, it was supposed that all temptation or suspicion of temptation to abuse the trust would be removed, for the guardian in such case would have no motive to administer the trust otherwise than for the ward's advantage. The guardianship extended to the

³ 1 Bl. Comm. 461; 2 Kent, Comm. 220, 221; *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202; *Earl v. Dresser*, 30 Ind. 11, 95 Am. Dec. 660; *Combs v. Jackson*, 2 Wend. (N. Y.) 153, 19 Am. Dec. 568; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; *Haynie v. Hall*, 5 Humph. (Tenn.) 290, 42 Am. Dec. 427. See ante, § 163.

⁴ *In re Benton*, 92 Iowa, 202, 60 N. W. 614, 54 Am. St. Rep. 546.

⁵ *People v. Schoonmaker*, 117 Mich. 190, 75 N. W. 439, 72 Am. St. Rep. 560.

⁶ 15 Am. & Eng. Enc. Law (2d Ed.) 24; *Ramsay v. Thompson*, 71 Md. 315, 6 L. R. A. 705, and note.

infant's person, and to the real estate inherited by him, but, it seems, not to his personal property, except such as was appurtenant to the land. The guardianship terminated when the infant reached the age of fourteen. Since socage tenures are abolished in this country, this kind of guardianship does not exist here, except in a modified form in New York.⁷

§ 174. Testamentary guardianship.

Testamentary guardianship was unknown to the common law, being created by the statute of 12 Charles II. c. 24 (1660). This act provided that a father, whether himself an infant or an adult, might, by deed or will, appoint a guardian for his infant children, the guardianship to last until the ward was of age, or for any less time. The guardianship extends to both the person of the ward and his estate, whether derived from the father or from some other source. The mother had no power to make such appointment. Similar statutes are in force in most of the states. Under some of the statutes the mother may appoint a testamentary guardian if the father is dead.⁸

⁷ 1 Bl. Comm. 461; 2 Kent, Comm. 222; *Combs v. Jackson*, 2 Wend. (N. Y.) 153, 19 Am. Dec. 568; *Foley v. Mut. L. Ins. Co.*, 138 N. Y. 333, 34 Am. St. Rep. 456, 20 L. R. A. 620. Land was held in socage when it was held by some certain service or rent, as distinguished from tenure by indefinite service, especially of a military character. See Bouv. Law Dict. "Socage."

⁸ 1 Bl. Comm. 462; 2 Kent, Comm. 224; 15 Am. & Eng. Enc. Law (2d Ed.) 27-31; note in 29 Am. Dec. 712; *Describes v. Wilmer*, 69 Ala. 25, 44 Am. Rep. 501; *Matter of Van Houten*, 3 N. J. Eq. 220, 29 Am. Dec. 707; *Kevan v. Waller*, 11 Leigh (Va.) 431. A father cannot appoint a testamentary guardian for his illegitimate child. *Ramsay v. Thompson*, 71 Md. 315, 6 L. R. A. 705.

§ 175. Chancery and probate guardianship—Informal guardianship.

Although there is some doubt as to how the jurisdiction arose, it is well settled that a court of equity has jurisdiction to appoint and remove guardians, and to direct and control them in the performance of their duties.⁹ In this country, however, such authority is in most, if not all, of the states, conferred by statute upon certain courts. In some states, special courts, known variously as 'probate, orphans', or surrogates' courts, have charge of all business of this kind.

In addition to the regular chancery guardianship, a quasi or informal guardianship is recognized in equity where a person not legally appointed or qualified as guardian intermeddles with or takes possession of and manages the property of an infant. Such a person, sometimes called a guardian *de son tort*, is in equity regarded as a trustee for the infant, and will be held accountable for the due discharge of his trust, upon the same principles as a regularly appointed and qualified guardian.¹⁰ He will also, on an accounting, be entitled

⁹ Perry, Trusts, § 603; 2 Kent, Comm. 226; 15 Am. & Eng. Enc. Law (2d Ed.) 31; Bispham, Princ. Eq. §§ 541-550; note in 18 Am. Dec. 689; Grattan v. Grattan, 18 Ill. 167, 65 Am. Dec. 726; Townsend v. Kendall, 4 Minn. 412, 77 Am. Dec. 534; Trotter v. Mutual Reserve Fund L. Ass'n, 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887. In England, the king, as *parens patriae*, was in a sense the guardian of all his subjects who needed a guardian, and this office the lord chancellor, through the court of chancery, exercised for the king. 1 Bl. Comm. 463. As to state guardianship of children, see Whalen v. Olmstead, 61 Conn. 263, 23 Atl. 964, 15 L. R. A. 593, and note; Matter of Knowack, 158 N. Y. 482, 53 N. E. 676, 44 L. R. A. 699.

¹⁰ 15 Am. & Eng. Enc. Law (2d Ed.) 123; Davis v. Harkness, 2 Ill. 173, 41 Am. Dec. 184; Van Epps v. Van Deusen, 4 Paige (N. Y.)

to credits for all proper disbursements on behalf of the infant.¹¹

§ 176. Guardianship by election of ward.

At common law, an infant over fourteen years of age might choose a guardian. This power, however, existed only where the infant was without any other guardian, and this, it seems, in one case only, namely, where the heir above the age of fourteen chose to supersede his guardian in socage by one of his own selection. At present, infants have no power to appoint a guardian, but an infant over fourteen may nominate a guardian, subject to the approval of the court.¹²

§ 177. Guardianship *ad litem*.

Ordinarily, unless so authorized by statute, a general guardian has no power to defend a suit brought against an infant. The infant in such case defends by a special guardian, called a guardian *ad litem*, appointed by the court in which the suit is brought. The authority and duties of the guardian *ad litem* extend only to the defense of the particular suit in connection with which he is appointed.¹³

64, 25 Am. Dec. 516; *State v. Gooch*, 97 N. C. 186, 2 Am. St. Rep. 284; *Honseal v. Gibbes*, 1 Bailey, Eq. (S. C.) 482, 23 Am. Dec. 186; *Evans v. Pearce*, 15 Grat. (Va.) 513, 78 Am. Dec. 635.

¹¹ *Matter of Beisel*, 110 Cal. 267; *In re Besondy*, 32 Minn. 385, 50 Am. Rep. 579; *Gilfillen's Estate*, 170 Pa. 185, 32 Atl. 585, 50 Am. St. Rep. 760; *Peale v. Thurmond*, 77 Va. 753.

¹² 1 Bl. Comm. 463; 2 Kent, Comm. 222; 15 Am. & Eng. Enc. Law (2d Ed.) 42.

¹³ 15 Am. & Eng. Enc. Law (2d Ed.) 2, 22, 56; monographic note in 97 Am. St. Rep. 995.

§ 178. Appointment and qualification of guardians—Foreign guardians.

Where the guardian is appointed by the court, the selection of the appointee is a matter within the discretion of the court. In making a choice, the welfare of the child is the primary consideration. The wishes of the child, if he is over fourteen, will be consulted, but are not controlling. Ordinarily, a near relative will be preferred if a fit person, the order of preference being the father, if living, then the mother, then the next nearest relatives, whether paternal or maternal.¹⁴

Usually a guardian, whether appointed by the court, or otherwise, is required to qualify as such by giving bond, etc.¹⁵

As a rule, the power and authority of a guardian over the person or estate of his ward do not extend beyond the state or country of his appointment; but, as a matter of comity, the authority of a guardian appointed by a court of the state in which the infant is domiciled may be recognized by the courts of other states. This rule of comity is in some states confirmed by statute, and provision is made by some of the statutes for the granting of ancillary letters to foreign guardians, in order to enable them to act with reference to the ward's property situated within the state.^{15a}

¹⁴ 15 Am. & Eng. Enc. Law (2d Ed.) 38-41. See the various statutory provisions.

¹⁵ 15 Am. & Eng. Enc. Law (2d Ed.) 43; *Deegan v. Deegan*, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

^{15a} See 13 Am. & Eng. Enc. Law (2d Ed.) 965; *Earl v. Dresser*, 30 Ind. 11, 95 Am. Dec. 660, and note; *In re Benton*, 92 Iowa, 202, 60 N. W. 614, 54 Am. St. Rep. 546; *Succession of Lewis*, 10

§ 179. Powers and duties of guardian as to ward's person.

Ordinarily, a guardian appointed for a child whose father is living, if not the father, will be guardian only of the ward's estate, unless the father be unfit to have the child's custody. But a guardian appointed for an orphan child is usually guardian of both his person and estate. Where the guardianship extends to the person, the guardian stands towards the ward in a quasi parental relation. He is charged in general with the duties and clothed with the powers of a parent. He has a legal right to the custody and control of the ward's person, superior to that of any one else, subject, however, to the control of the court, to be exercised as the welfare of the child demands.¹⁶

The domicile of the father at his death, and not that of the guardian, is the domicile of the ward; but the guardian may fix and change the ward's domicile within the state of his appointment. According to the weight of authority, though there is authority to the contrary, a guardian, not a natural or testamentary guardian, cannot change the ward's domicile from one state to an-

La. Ann. 789, 63 Am. Dec. 600; *Townsend v. Kendall*, 4 Minn. 412, 77 Am. Dec. 534. As a rule, the jurisdiction to appoint guardians of the persons of infants is vested exclusively in the courts of the state or country in which they are domiciled, while guardians of their estate may be appointed in any jurisdiction in which they have property. Note in 53 Am. St. Rep. 185. See *Boyd v. Glass*, 34 Ga. 253, 89 Am. Dec. 252; *Kraft v. Wickey*, 4 Gill & J. (Md.) 332, 23 Am. Dec. 569; *Kurtz v. St. Paul, etc., R. Co.*, 48 Minn. 339, 51 N. W. 221, 31 Am. St. Rep. 657.

¹⁶ 15 Am. & Eng. Enc. Law (2d Ed.) 50; note in 89 Am. St. Rep. 275; *Brooke v. Logan*, 112 Ind. 183, 2 Am. St. Rep. 177; *Townsend v. Kendall*, 4 Minn. 412, 77 Am. Dec. 535.

other except, in the case of a chancery guardianship, with the consent of the court.¹⁷

Under the various statutes regulating the subject, the guardian of an orphan child is the proper person to give or withhold consent to the ward's adoption, enlistment, marriage, etc.¹⁸

A guardian is not entitled to his ward's services,¹⁹ and hence cannot maintain an action for the seduction of his female ward.²⁰

§ 180. Same—Duty of support, etc.—In general.

Like a father, the guardian owes to the ward the duties of maintenance, protection, and education. His obligation, however, is not, like that of a father, absolute. He is not, unless the father, ordinarily bound to discharge the duties at his own expense, but may use for this purpose the property of the ward. In supplying the wants of the ward, he must, of course, consider the extent of the ward's estate. If the ward has no estate, or an insufficient estate for his support, the guardian may put him to work to earn his living, or, if the ward

¹⁷ See 15 Am. & Eng. Enc. Law (2d Ed.) 52; note in 89 Am. St. Rep. 278; *Lamar v. Micou*, 112 U. S. 452; *Townsend v. Kendall*, 4 Minn. 412, 77 Am. Dec. 535; *Wood v. Wood*, 5 Paige (N. Y.) 596, 28 Am. Dec. 451; *Wheeler v. Hollis*, 19 Tex. 522, 70 Am. Dec. 363. See, also, post, § 190.

¹⁸ 15 Am. & Eng. Enc. Law (2d Ed.) 53.

¹⁹ *Schouler*, Dom. Rel. § 335. See, also, 15 Am. & Eng. Enc. Law (2d Ed.) 97.

²⁰ *Blanchard v. Ilsley*, 120 Mass. 487, 21 Am. Rep. 535. But the contrary has been held on the ground that the guardian stands in loco parentis. *Fernsler v. Moyer*, 3 Watts & S. (Pa.) 416, 39 Am. Dec. 33. See 25 Am. & Eng. Enc. Law (2d Ed.) 196; note in 89 Am. St. Rep. 280.

be too young or feeble to work, he may surrender him to some charitable institution. He may, of course, support the child at his own expense, or become by contract personally liable for his support.²¹

§ 181. Same—Use of ward's estate for his support.

While the guardian is not compelled to support the ward except out of the ward's estate, not all of such estate is ordinarily available for this purpose. It is well settled that a guardian cannot expend more than the income of the ward's property without authority of court. The order in which the ward's property may be expended for his support and education is as follows: First. The income of the property, real or personal. This the guardian may use so far as is reasonable, without special authority. Second. If the income proves insufficient, the principal of the personal property. Third. If both the foregoing are insufficient, the real estate, or so much thereof as may be necessary. The guardian cannot use the principal of either personal or real property without the authority of the court.²² The court will

²¹ Schouler, Dom. Rel. §§ 336, 337; note in 57 Am. Dec. 227; *Call v. Ward*, 4 Watts & S. (Pa.) 118, 39 Am. Dec. 64. A guardian should not permit his ward, with small estate, to live in idleness, when he is able to earn his own living, unless for the purpose of education. *Clark v. Clark*, 8 Paige (N. Y.) 152, 35 Am. Dec. 676; *Brown's Appeal*, 112 Pa. 18, 5 Atl. 13; *Anderson v. Thompson*, 11 Leigh (Va.) 458. A guardian who supports his ward in his own family, without intending to charge therefor, will not be allowed credit for such support. *State v. Slevin*, 93 Mo. 253, 3 Am. St. Rep. 526.

²² *Perry, Trusts*, § 618, 15 Am. & Eng. Enc. Law (2d Ed.) 99-106; note in 89 Am. St. Rep. 299; *Davis v. Harkness*, 6 Ill. 173, 41 Am. Dec. 184.

grant such authority in a proper case, but encroachments upon the principal will be viewed with a jealous eye, and will be permitted only when plainly for the best interests of the ward. The guardian should seek such authority before expending any of the principal, but, according to the weight of authority, the court may ratify an expenditure made without previous sanction in a case where such sanction would have been given before the expenditure, if then applied for.²³

In expending the income of the ward's estate the guardian is not limited to the income of the current year, but may, if necessary, anticipate future income, or use the accumulated income of previous years.²⁴

§ 182. Powers and duties of guardian as to ward's estate.

A guardian occupies towards the ward's estate the relation of trustee, and this branch of our subject falls, therefore, under the general law of trusts, a full treatment of which will be found in works on equity jurisprudence.

In general, the guardian has the management and control of the ward's property, and is entitled to its possession. He may collect or sue for all choses in action belonging to the ward, and receive all moneys or income. He may sell the ward's personal property, but not his real estate, except when authorized by the court, or by statute, or otherwise. He may lease the real prop-

²³ Notes in 89 Am. St. Rep. 300, and 49 Am. Dec. 659; *Beeler v. Dunn*, 3 Head (Tenn.) 87, 75 Am. Dec. 761; *Hobbs v. Harlan*, 10 Lea (Tenn.) 268, 43 Am. Rep. 309; *Barton v. Bowen*, 27 Grat. (Va.) 849.

²⁴ *Schouler*, Dom. Rel. § 338; note in 89 Am. St. Rep. 300.

erty for a period not extending beyond his term of office, and receive all rents and profits. In general, he may, and it is his duty to, do all that is necessary to collect, preserve, and make productive the estate of his ward.²⁵

The guardian, like other trustees, must act with the utmost honesty and good faith in the discharge of his trust. This rule, it seems, is and should be strictly enforced against him.²⁶ So, also, he must exercise reasonable diligence and skill in the management of the ward's property. For any losses due to his negligence he is responsible to the ward; but where he has exercised reasonable care and diligence in the performance of his duties, and losses nevertheless occur, the guardian

²⁵ As to the powers, duties, and liabilities of the guardian in respect to the ward's estate, see, generally, 2 Kent, Comm. 228; 15 Am. & Eng. Enc. Law (2d Ed.) 53-73; note in 89 Am. St. Rep. 257. For particular cases, see *Schmidt v. Shaver*, 196 Ill. 108, 63 N. E. 655, 89 Am. St. Rep. 250; *O'Herron v. Gray*, 168 Mass. 573, 47 N. E. 429, 60 Am. St. Rep. 411; *Northwestern Guaranty Loan Co. v. Smith*, 15 Mont. 101, 38 Pac. 224, 48 Am. St. Rep. 662; *Butler v. Legro*, 62 N. H. 350, 13 Am. St. Rep. 573; *Warren v. Union Bank of Rochester*, 157 N. Y. 259, 51 N. E. 1036, 68 Am. St. Rep. 777.

The state, as *parens patriae*, may, by act of legislature, authorize guardians to sell the real estate of their wards. *Louisville, etc., R. Co. v. Blythe*, 69 Miss. 939, 11 So. 111, 30 Am. St. Rep. 599. As to such sales, see *Daughtry v. Thweatt*, 105 Ala. 615, 16 So. 920, 53 Am. St. Rep. 146; *Scarf v. Oldrich*, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190; *Lenders v. Thomas*, 35 Fla. 513, 17 So. 633, 48 Am. St. Rep. 255; *Tracy v. Roberts*, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394; *Carder v. Culbertson*, 100 Mo. 269, 13 S. W. 88, 13 Am. St. Rep. 548; *Hughes v. Goodale*, 26 Mont. 93, 63 Pac. 702, 91 Am. St. Rep. 410; *Bachelor v. Korb*, 58 Neb. 122, 78 N. W. 485, 76 Am. St. Rep. 70; *Taffinder v. Merrell*, 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814.

²⁶ Pom. Eq. Jur. § 1075. See cases cited in note 29, *infra*.

is not liable. He is not held to so high a degree of accountability as would deter responsible men from accepting such a trust, but it is sufficient that he observes perfect good faith, and exercises that degree of diligence and care which men of ordinary prudence usually exercise, in like circumstances, in their own affairs.²⁷ The guardian is, of course, liable for a willful neglect or disregard of duty.²⁸

An important principle in this connection is that the guardian's trust is one of obligation and duty, and not of speculation and profit. The estate must be managed solely for the benefit of the ward, and not for the personal advantage of the guardian. The guardian is not permitted to use his position for his own benefit, or to make any profit out of it for himself beyond the compensation which the law allows him for his services. Any profit he may make out of the estate belongs to the ward. So careful is the court to protect the ward's interests that the guardian will not be allowed to place himself in a position antagonistic to the best interests of the ward, which it is his duty to promote. He cannot use the ward's property in his own business, nor, as guardian, deal with himself as an individual, as by lending or selling to, or borrowing or buying from himself. In all his dealings with his ward's estate he is held strictly to the obligations of a trustee.²⁹

²⁷ 15 Am. & Eng. Enc. Law (2d Ed.) 73, 107; note in 75 Am. Dec. 447; *Slaughter v. Favorite*, 107 Ind. 291, 57 Am. Rep. 106; *Coffin v. Bramlitt*, 42 Miss. 194, 97 Am. Dec. 449; *State v. Slevin*, 93 Mo. 526, 3 Am. St. Rep. 526; *Landmesser's Appeal*, 126 Pa. 115, 12 Am. St. Rep. 854; *Barney v. Parsons*, 54 Vt. 623, 41 Am. Rep. 858.

²⁸ *Draper v. Joiner*, 9 Humph. (Tenn.) 612, 49 Am. Dec. 719.

²⁹ 2 Kent, Comm. 229; 15 Am. & Eng. Enc. Law (2d Ed.) 75;

The guardian must, of course, be careful to act within his authority, and, if in doubt, should apply to the court in all important matters for instruction and authority. Unauthorized acts of the guardian are at least voidable by the court, or by the ward upon his attaining his majority. . . The court may sanction such acts if to the ward's advantage, but probably not otherwise.³⁰ The ward himself, of course, upon becoming of age, may ratify the guardian's unauthorized acts, whether advantageous or not, for he is the only person concerned.³¹

§ 183. Same—Duty as to investments.

A guardian has power, and it is his duty, to invest his ward's funds in his hands so as to produce an income. He is allowed a reasonable time—usually six months—after the receipt of the funds in which to make the investment, and he will be charged with interest on funds which he negligently fails to invest.³²

note in 89 Am. St. Rep. 304-308; *Winter v. Truax*, 87 Mich. 324, 49 N. W. 604, 24 Am. St. Rep. 160; *Boyer v. East*, 161 N. Y. 580, 56 N. E. 114, 76 Am. St. Rep. 290. The use by the guardian in his own business of his ward's funds is a breach of his bond, for which he and his sureties are liable. *State v. Sanders*, 62 Ind. 562, 30 Am. Rep. 203; *State v. Branch*, 134 Mo. 592, 36 S. W. 226, 56 Am. St. Rep. 533; *Deegan v. Deegan*, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742. A guardian whose interest is hostile to that of his ward is incompetent to act for his ward in respect to that interest. *Roodhouse v. Roodhouse*, 132 Ill. 360, 24 N. E. 55, 22 Am. St. Rep. 539.

³⁰ 1 Min. Inst. (4th Ed.) 471; *Schouler*, Dom. Rel. §§ 341, 348, 385.

³¹ *Schouler*, Dom. Rel. § 385; 15 Am. & Eng. Enc. Law (2d Ed.) 65, 81; *Howard v. Cassels*, 105 Ga. 412, 31 S. E. 562, 70 Am. St. Rep. 44.

³² *Perry*, Trusts, § 462; 2 Kent, Comm. 231; note in 89 Am. St. Rep. 296.

In making investments the guardian must act honestly and faithfully, and exercise a sound discretion, such as men of ordinary prudence and intelligence use in their own affairs. In loaning the ward's money he must take proper security, or he will be personally liable for loss. In England and a few of the states the loan must be secured by real estate or governmental securities; but in most of the states good personal security is approved. Loans on or investments in the stock of private corporations, if made prudently and in good faith, are proper.³³ The guardian may not employ the ward's funds in trade, manufacturing, or speculative enterprises without express authority. If he does so and loses, he is responsible, and, if he makes a profit, the ward may elect to take the profits or interest.³⁴

A guardian may deposit guardianship money in a bank for safe keeping, and, if he uses reasonable prudence, he is not liable for their loss by the failure of the bank; but if he mingles the funds with his own, or deposits them in his own name, with nothing to indicate their trust character, he is personally liable for their loss, although he may have acted with perfect

³³ 15 Am. & Eng. Enc. Law (2d Ed.) 55, 107-109; notes in 89 Am. St. Rep. 292, and 40 Am. Dec. 506; *Lamar v. Micou*, 112 U. S. 452; *Slaughter v. Favorite*, 107 Ind. 291, 57 Am. Rep. 106; *Lovell v. Minot*, 20 Pick. (Mass.) 116, 32 Am. Dec. 206; *Easton v. Somerville*, 111 Iowa, 164, 82 N. W. 475, 82 Am. St. Rep. 502; *Richardson v. Boynton*, 12 Allen (Mass.) 138, 90 Am. Dec. 141; *State v. Gooch*, 97 N. C. 186, 1 S. E. 653, 2 Am. St. Rep. 284; *Konigsmacher v. Kimmel*, 1 Pa. 207, 21 Am. Dec. 374; *Barney v. Parsons*, 54 Vt. 623, 41 Am. Rep. 858.

³⁴ Note in 89 Am. St. Rep. 295; *Warren v. Union Bank of Rochester*, 157 N. Y. 259, 51 N. E. 1036, 68 Am. St. Rep. 777.

good faith, and, except as to the form of the deposit, with reasonable prudence. By making the deposit in his own name, he gains credit with the bank, and reaps all the advantages which can be derived from the apparent ownership of the fund, thus taking personal advantage of his position. Moreover, he exposes the ward's property to the attacks of his own creditors. It is held, therefore, that by so appropriating his ward's money, he becomes an absolute debtor to the estate.³⁵

Since real estate and personalty belonging to the ward are subject to different rules so far as the guardian's power over the property is concerned, it would seem that the guardian would have no power to change the character of the ward's estate from realty to personalty, or *vice versa*, for, if he were allowed to do so, he might thus, by his own act, determine to a considerable extent his powers over the estate, and also alter the succession of the property in case of the ward's death. It is accordingly held that, as a rule, the guardian cannot, without special authority, either sell the ward's real estate, and hold or invest the proceeds as personalty, or invest the ward's funds in real estate. Authority to change the nature of the estate is, however, sometimes allowed by statute, or, according to some of the

³⁵ Perry, Trusts, §§ 443, 463; note in 89 Am. St. Rep. 297; Jenkins v. Walter, 8 Gill & J. (Md.) 218, 29 Am. Dec. 539; Coffin v. Bramlitt, 42 Miss. 194, 97 Am. Dec. 449; State v. Elliott, 157 Mo. 609, 57 S. W. 1087, 80 Am. St. Rep. 643; In re Law's Estate, 144 Pa. 499, 22 Atl. 831; Booth v. Wilkinson, 78 Wis. 652, 47 N. W. 1128, 23 Am. St. Rep. 443. The same rule applies to investments in the guardian's name. Matter of Bane, 120 Cal. 533, 52 Pac. 852, 65 Am. St. Rep. 197; Draper v. Joiner, 9 Humph. (Tenn.) 612, 49 Am. Dec. 719.

authorities, may be granted by a court of equity in the exercise of its inherent powers. Other authorities maintain that a court of equity cannot authorize such a change, in the absence of a statute conferring such power upon the court.³⁶

§ 184. Contracts of guardian or ward.

It is generally held that a guardian cannot, by any contract, bind the person or estate of his ward. He is personally liable upon all of his contracts made in discharge of his duty as guardian, but for all his reasonable expenditures he is entitled to reimbursement from the ward's estate.³⁷

The reasons for this rule, making the guardian liable, have been well set forth as follows: "The guardian is charged with the duty of controlling and managing the person and property of the ward, and judging of the expenditures which may be needful for either, and he alone is informed of the condition of the ward's resources. Hence the contract should be made with the guardian, and hence the guardian ought to be looked to for payment. To allow a departure from the above rule would, in the first place, have the effect to encour-

³⁶ 2 Perry, Trusts, §§ 605, 606; 2 Kent, Comm. 230; note in 89 Am. St. Rep. 310; *Boisseau v. Boisseau*, 79 Va. 73, 52 Am. Rep. 616.

³⁷ 15 Am. & Eng. Enc. Law (2d Ed.) 70; note in 89 Am. St. Rep. 282; *Nichols v. Sargent*, 125 Ill. 309, 17 N. E. 475, 8 Am. St. Rep. 378; *Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87; *Fessenden v. Jones*, 52 N. C. (7 Jones Law) 14, 75 Am. Dec. 445; *Andrus v. Blazzard*, 23 Utah, 233, 63 Pac. 888, 54 L. R. A. 354. There is some dissent from the rule of the text. See *Price's Appeal*, 116 Pa. 410, 9 Atl. 856; *Caldwell v. Young*, 21 Tex. 800; *Barnum v. Frost*, 17 Grat. (Va.) 398.

age, in the youth of the country, appeals from the judgments of their guardians, and, in the next, make the right to compensation on the part of the creditor depend upon a condition of things of which he had no means to judge, and therefore uncertain and precarious.

* * * To turn persons, dealing with the guardian in relation to the ward's estate, over to the ward, would render it necessary in every case for such persons, in order to guard themselves against loss, to enter into an account with the guardian as to the amount of the ward's estate,—the income and expenditures, and the necessity for the expenditure then contemplated. Such requirements, applied to the ordinary transactions of life, * * * are manifestly absurd.”³⁸ From this statement, the wisdom and justice of the rule become manifest. The guardian is prevented from imposing on third persons by making contracts with them beyond the ward's means, and is also made careful not to exceed the assets of the estate. At the same time it works no hardship upon the guardian himself, for he will be reimbursed for all proper expenditures, and plainly ought to be held responsible for all expenditures improperly made by him.

The fact that the guardian contracts expressly as guardian or on behalf of the ward does not change the rule. In such case the ordinary rule of the law of principal and agent—that the agent, acting as such, intends to bind his principal alone—does not apply. The guardian has no authority to bind his ward, and, if there is

³⁸ Manly, J., in *Fessenden v. Jones*, 52 N. C. (7 Jones Law) 14, 75 Am. Dec. 445.

any liability upon the contract, it must be that of the guardian himself.³⁹ It seems, however, that if, in such case, the other party expressly agrees to look only to the ward's estate, the guardian will not be personally bound in case there is a deficiency of assets.⁴⁰

Conversely to the rule that the guardian cannot bind the person or estate of his ward, it is held that the guardian is not ordinarily liable on contracts made by the ward. Thus he is not liable for necessities furnished to the ward, since he is not personally bound to support the ward;⁴¹ nor, in general, is the ward, or his estate, liable on his own contracts for necessities, where the guardian makes reasonable provision for him. The ward stands on the same footing as any other infant in respect to his power to bind himself by contract.⁴²

§ 185. Transactions between guardian and ward.

The relation of a guardian to his ward is in the highest degree fiduciary, and, aside from the incapacity of the ward to contract during his minority, the depend-

³⁹ *Nichols v. Sargent*, 125 Ill. 309, 17 N. E. 475, 8 Am. St. Rep. 378; *Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87; *Andrus v. Blazard*, 23 Utah, 233, 63 Pac. 888, 54 L. R. A. 356. See *Fessenden v. Jones*, 52 N. C. (7 Jones Law) 14, 45 Am. Dec. 445.

⁴⁰ See *Nichols v. Sargent*, 125 Ill. 309, 17 N. E. 475, 8 Am. St. Rep. 378.

⁴¹ 15 Am. & Eng. Enc. Law (2d Ed.) 78; note in 89 Am. St. Rep. 286; *Overton v. Beavers*, 19 Ark. 623, 70 Am. Dec. 610; *Call v. Ward*, 4 Watts & S. (Pa.) 118, 39 Am. Dec. 64; *Barnum v. Frost*, 17 Grat. (Va.) 398. A guardian has no power to avoid a contract made by his infant ward. *Oliver v. Houdlet*, 13 Mass. 237, 7 Am. Dec. 134. Nor can he ratify such a contract. *Hobbs v. Nashville, etc., R. Co.*, 122 Ala. 602, 26 So. 139, 82 Am. St. Rep. 103.

⁴² See post, § 192

ence of the ward upon his guardian is so complete, and the influence of the guardian over the ward is so great, that it is hardly possible for any transactions between them during the continuance of the relationship, which are beneficial to the guardian, to be sustained. All such transactions are presumptively void, not, indeed, upon the ground that actual fraud was practiced by the guardian, but because, in such a relation, no opportunity to commit fraud should be tolerated.⁴³ This rule applies not only to transactions between the guardian and the ward while the relation exists, but also to such transactions soon after the termination of the relation by the ward's attaining his majority. In such case it is presumed that the influence of the guardian, previously acquired, still continues, and hence any gift, conveyance, contract, settlement, etc., by which the guardian derives a benefit, is presumed to be invalid, and will not be sustained without clear proof of fairness in the transaction, free consent and full knowledge of the circumstances on the part of the ward, and the utmost good faith on the part of the guardian. If these conditions are satisfied, the transaction is as valid as a similar transaction between any other competent parties.⁴⁴

⁴³ 15 Am. & Eng. Enc. Law (2d Ed.) 85; 2 Pomeroy, Eq. Jur. § 961; Bispham, Princ. Eq. § 234; note in 89 Am. St. Rep. 302.

⁴⁴ Ferguson v. Lowery, 54 Ala. 510, 25 Am. Rep. 718; Gillett v. Wiley, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587; Wright v. Arnold, 14 B. Mon. (Ky.) 638, 61 Am. Dec. 172; Garvin v. Williams, 44 Mo. 314, 100 Am. Dec. 314; Waller v. Armistead, 2 Leigh (Va.) 11, 21 Am. Dec. 594; and references in note immediately preceding.

§ 186. Termination of guardianship.

A guardianship may be terminated in either of several ways: (1) *By the death of the ward.* This *ipso facto* terminates the guardianship. (2) *By the death of the guardian.* In such case, a new guardian should be appointed, unless the guardianship was held by two persons jointly, in which case the survivor will continue to act as guardian. (3) *By the marriage of the ward.* The marriage of a female ward to an adult terminates the guardianship. And her marriage to a minor also terminates the guardianship as to her person, and, according to what seems to be the better view, as to her estate also. In such case, the guardian, if any, of the husband, succeeds to the guardianship of the wife. The marriage of a male ward terminates the guardianship as to his person, but not as to his estate. (4) *By the marriage of female guardian.* This ordinarily terminated the guardianship at common law, but probably not under modern statutes, giving to a married woman the powers of a *feme sole*. (5) *By the ward's becoming of age.* The guardianship of an infant necessarily ends when he becomes of age. A guardianship in socage or for nurture terminates when the infant becomes fourteen. (6) *By expiration of term of appointment.* Where a testamentary guardian is appointed for a stated period less than the full term of the ward's minority, his office terminates upon the expiration of such period. (7) *By the resignation of the guardian.* At common law the office of guardian was deemed so honorable that the person appointed ordinarily could neither refuse to serve nor resign. Modern statutes recognize the right

of a guardian to do either, but he cannot resign without first settling up his guardianship accounts. (8) *By removal of the guardian.* The courts may remove a guardian for good cause, as for his unfitness or malfeasance, or where he removes beyond the jurisdiction of the court.⁴⁵

Where a guardian has died, resigned, or been removed, the court having jurisdiction of such matters may appoint a new guardian to succeed to the office thus made vacant.⁴⁶

§ 187. Compensation and reimbursement of guardian.

Ordinarily, in England, a guardian is allowed no compensation for his services and responsibilities as guardian, the honor of the office being deemed a sufficient return therefor.⁴⁷ In this country a different rule obtains, and in all the states the guardian is allowed compensation out of the ward's estate. In some states the compensation is a commission fixed by statute; in others, a reasonable amount is allowed by the court.⁴⁸ Both in England and in this country the guardian is allowed

⁴⁵ 15 Am. & Eng. Enc. Law (2d Ed.) 45-50; note in 29 Am. Dec. 715; *Presley v. Weakley*, 135 Ala. 517, 33 So. 434, 93 Am. St. Rep. 39 (death of guardian); *Overton v. Beavers*, 19 Ark. 623, 70 Am. Dec. 610 (majority of ward); *Estate of Livermore*, 132 Cal. '99, 64 Pac. 113, 84 Am. St. Rep. 37 (death of ward); *Perkins v. Cheney*, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495; *Deegan v. Deegan*, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742 (removal); *Montoya de Antonio v. Miller*, 7 N. Mex. 289, 34 Pac. 40, 21 L. R. A. 699 (marriage of female ward).

⁴⁶ *Estate of Henning*, 128 Cal. 214, 60 Pac. 762, 79 Am. St. Rep. 43.

⁴⁷ Schouler, Dom. Rel. § 375.

⁴⁸ 15 Am. & Eng. Enc. Law (2d Ed.) 109-111.

reimbursement for his reasonable and proper expenditures in the discharge of his trust,⁴⁹ and to secure reimbursement he has an equitable lien therefor upon the ward's estate.⁵⁰

§ 188. Accounting by guardian.

The guardian is required, upon the termination of his guardianship, to give an account of his trust, and deliver and pay over to the ward or other person entitled thereto all the money or property with which he is chargeable. The settlement may be made with the ward upon his reaching his majority, but contracts and settlements made with the ward soon after he attains his majority are viewed with suspicion, and will be sustained only when free from fraud and undue influence. Generally, the accounts must be adjusted before and approved by the court.⁵¹

⁴⁹ 15 Am. & Eng. Enc. Law (2d Ed.) 98 et seq.; *In re Besondy*, 32 Minn. 385, 50 Am. Rep. 579; *McDowell v. Caldwell*, 2 McCord Eq. (S. C.) 43, 16 Am. Dec. 635.

⁵⁰ *Curran v. Abbott*, 141 Ind. 492, 40 N. E. 1091, 50 Am. St. Rep. 337; *Burgert v. Caroline*, 31 Wash. 62, 71 Pac. 724, 96 Am. St. Rep. 889.

⁵¹ As to accounting and settlement, see 15 Am. & Eng. Enc. Law (2d Ed.) 87-115; *Lataillade v. Orena*, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219; *State v. Parsons*, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430; *Deegan v. Deegan*, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742; *Douglass v. Ferris*, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435; *State v. Gouch*, 97 N. C. 186, 1 S. E. 653, 2 Am. St. Rep. 284. If a guardian dies without having rendered any account, his personal representative may be required to account for him. *Peel v. McCarthy*, 38 Minn. 451, 38 N. W. 205, 8 Am. St. Rep. 681; *Perkins v. Stimmel*, 114 N. Y. 359, 11 Am. St. Rep. 659. As to settlements with the ward himself, see *Stanley's Appeal*, 8 Pa. 431, 49 Am. Dec. 530; *Johnson v. Johnson*, 2 Hill Ch. (S. C.) 277, 29 Am. Dec. 72; and ante, § 185.

PART IV.

INFANCY.

CHAPTER XII.

IN GENERAL.

- § 189. In General—Who are Infants.
- 190. Domicile of Infants.
- 191. The Capacity and Disabilities of Infants—In General.
- 192. Same—Capacity to Contract.
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- 194. Same—Capacity to Act as Agent or Fiduciary.
- 195. Same—Capacity to Hold Office.
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- 197. Criminal Responsibility of Infants.
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§ 189. In general—Who are infants.

The subject of infancy is so closely related to the subjects which have just been discussed that it is deemed proper to treat it, at least briefly, in the present connection. The law relating to infants has already been considered to some extent in the chapters on Parent and Child and Guardian and Ward, but there remain some further matters which demand our attention. First, then, we shall inquire, who are infants?

A person is an infant, in contemplation of law, until he arrives at the age of majority. This age, arbi-

trarily fixed by law so as to correspond more or less closely with the development of natural capacity, varies in different countries, and is different for different purposes, and, in some cases, for the different sexes. By the common law, the age of majority for both sexes, at which one becomes fully *sui juris* for all purposes, is twenty-one years.¹ There is some conflict as to the precise point of time at which one becomes of age. According to Blackstone and other authorities, a person becomes of age on the first moment of the day before the twenty-first anniversary of his birth, and there are several decisions to this effect.² Thus, a person born at 11:59 p. m., December 15, 1870, is legally of age at 12:01 a. m., December 14, 1891, or practically two days before he is in fact twenty-one years old. This is upon the principle that the law knows no fraction of a day, and, if a person begins his twenty-second year at any moment of the anniversary of his birth, he begins it the first moment of that day, which, of course, means that he completes his twenty-first year the last moment of the day before, and hence, since the day is a unit, completes it the first moment of that day. This reasoning is not very satisfactory, and, notwithstanding the authority in its support, it seems that the weight of reason and of common sense is to the effect that a person becomes of age on the anniversary of his birth, that is to say, since

¹ 1 Bl. Comm. 463. In some states, by statute, females become of age at eighteen. 16 Am. & Eng. Enc. Law (2d Ed.) 262.

² 1 Bl. Comm. 463; 2 Kent, Comm. 233; State v. Clarke, 3 Har. (Del.) 557, Woodruff Cas. 308; Bardwell v. Purrington, 107 Mass. 419; Linhart v. State, 33 Tex. Cr. R. 504, 27 S. W. 260; Ross v. Morrow, 85 Tex. 172, 19 S. W. 1090, 16 L. R. A. 542.

the law knows no fraction of a day, on the first moment of his birthday.³ By this rule, legal age and actual age would correspond more closely by twenty-four hours than by the other rule, which, however, is probably too firmly established to be overthrown. Fortunately the point is rarely material, and hence the rule as established can do little harm, and discussions of the question are largely academic.

§ 190. Domicile of infants.

An infant can have no independent domicile, but, in general, his domicile will be that of his natural guardian or protector. He cannot himself either choose or change his domicile. If the father is living, his domicile is that of the child, at least so long as the normal relationship remains unimpaired; and if the father changes his domicile, that of the child changes therewith. The mere fact that the father and mother are living apart, and the child is actually living with the mother, does not change the rule that the child's domicile is that of the father, even conceding that in such case the mother has acquired a separate domicile. If, however, the parents have been divorced, and the custody of the child has been awarded to the mother, who then becomes its natural guardian, the child's domicile is that of its mother.⁴

³ See 1 Am. & Eng. Enc. Law (2d Ed.) 928; Redfield, Wills, 19. By statute in some states a person becomes of age on the first moment of the anniversary of his birth. 16 Am. & Eng. Enc. Law (2d Ed.) 262.

⁴ 10 Am. & Eng. Enc. Law (2d Ed.) 29, 30; Minor, Conf. Laws, § 37; Taylor v. Jeter, 33 Ga. 195, 81 Am. Dec. 202; Fox v. Hicks, 81 Minn. 197, 83 N. W. 538, 50 L. R. A. 663.

Upon the death of the father, the mother, if she survives, succeeds to his position as natural guardian, and, at least so long as she remains unmarried, her domicile is that of the child. There is some conflict as to the effect of the mother's remarriage in such case. Since by the marriage she loses her power to choose her domicile, and her domicile becomes that of her husband, and he is not the natural guardian of her child, it is held by some authorities that thereafter the domicile of the child remains that of the mother at the time of her remarriage, until she again becomes discoverd, or the child becomes of age and chooses a domicile of his own. According to what seems to be the better view, however, this rule holds only where the child does not actually reside with his mother at his stepfather's domicile. If he actually lives with his stepfather as a member of his family, the child's domicile becomes that of his stepfather.⁵

If both parents are dead, the domicile of the child is that of his last surviving parent until legally changed, for the child cannot change his own domicile.⁶ If, however, the child actually resides with another person standing *in loco parentis*, for example, with a grandparent, he thereby acquires the domicile of the latter.⁷

⁵ 10 Am. & Eng. Enc. Law (2d Ed.) 30; Minor, Conf. Laws, §§ 38, 39. See *Lamar v. Micou*, 112 U. S. 452; *School Directors v. James*, 3 Watts & S. (Pa.) 568, 37 Am. Dec. 525; *Allen v. Thomason*, 11 Humph. (Tenn.) 536, 54 Am. Dec. 55.

⁶ 10 Am. & Eng. Enc. Law (2d Ed.) 31; Minor, Conf. Laws, § 40; *Lamar v. Micou*, 112 U. S. 452; *Estate of Henning*, 128 Cal. 214, 60 Pac. 762, 79 Am. St. Rep. 43; *Van Matre v. Sankey*, 148 Ill. 356, 36 N. E. 628, 39 Am. St. Rep. 196.

⁷ *In re Benton*, 92 Iowa, 202, 60 N. W. 614, 54 Am. St. Rep. 546.

The authorities are conflicting as to the power of the guardian of an orphan child to determine its domicile. According to what seems to be the better view, if the child actually lives with the guardian, his domicile is that of the guardian, and changes therewith, at least within the state of the guardian's appointment; but if the child is not a member of the guardian's family, his domicile remains that of his last surviving parent.⁸

The domicile of an illegitimate child is that of his mother.⁹

§ 191. The capacity and disabilities of infants—In general.

An infant is not fully *sui juris*, but labors under certain disabilities, which decrease with increasing age until majority. At common law, "the ages of male and female are different for different purposes. A male at twelve years old may take the oath of allegiance; at fourteen is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at seventeen may be an executor; and at twenty-one is at his own disposal, and may alien his lands, goods, and chattels. A female, also, at seven years of age may be betrothed or given in marriage; at nine is entitled to dower; at twelve is at years of maturity, and therefore may consent or disagree

See, also, *Cox v. Boyce*, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483.

⁸ *Minor*, Conf. Laws, § 41; *Lamar v. Micou*, 112 U. S. 452. See ante, § 179.

⁹ *Minor*, Conf. Laws, § 42.

to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at fourteen is at years of legal discretion, and may choose a guardian; at seventeen may be executrix; and at twenty-one may dispose of herself and her lands."¹⁰ These rules of the common law have been changed in some states by statute, especially in respect to capacity to dispose of personal property by will.

§ 192. Same—Capacity to contract.

It is not proposed, in the present work, to discuss the subject of infants' contracts, since this is fully treated in works on the law of contracts. It will be sufficient for our present purpose to state very briefly some of the general principles of the subject.

An infant, although not, like a married woman at common law, under an absolute disability to contract, is not fully competent, most of his contracts being voidable, at his option, upon his attaining his majority. This rule is intended for the benefit of the infant as a protection against improvident contracts, and, in fact, confers a privilege, rather than imposes a disability. The contracts of infants, as a rule, are either valid or voidable, though in a few jurisdictions the courts still apply the old rule of the common law that contracts manifestly prejudicial to the infant are void. Certain contracts are as binding upon an infant as an adult. Such are the quasi contracts of marriage, with its attendant liabilities, and for necessities. So, also, con-

¹⁰ 1 Bl. Comm. 463.

tracts authorized by law, such as voluntary assignments for the benefit of creditors, or contracts of enlistment, are valid. Again, contracts executed in the performance of a legal obligation are binding, as, for example, a note given by an infant in settlement of his liability for a tort.

Of the infant's valid contracts, those for necessities are the most important. Such contracts, or, rather, quasi contracts, are governed largely by the principles already discussed in connection with the liability of a husband or parent for necessities furnished to a wife or child. An infant can be held liable for necessities only when the things furnished were technically necessities, and were also actually necessary in the particular case, because not supplied by parent or guardian or otherwise. As in the case of a wife or child, persons supplying the wants of an infant do so at their peril, and cannot recover if the actual circumstances were such that the things furnished were not necessities. Since the liability of the infant is only quasi contractual, he is liable only for what the necessities were reasonably worth, and not for what he promised to pay for them.

Most contracts of infants, not falling within the classes above described, are merely voidable,—that is, they are not binding upon the infant if he elects to repudiate them, but bind him if ratified by him after coming of age. The subject of ratification or avoidance is too extensive to be profitably stated in mere outline. It should be noted that a contract of an infant with an

adult who is under no legal disability is binding on the adult, although voidable by the infant.¹¹

§ 193. Same—Capacity to acquire, hold, or dispose of property.

An infant is just as competent to acquire property, otherwise than by contract, and to own or hold the same, as an adult.¹² Even an unborn child *en ventre sa mere* is, from the time of conception, legally competent to take property by descent, will, or otherwise, though it takes conditionally,—subject to its being born alive.¹³ An infant may acquire real or personal property by purchase, with the right, after coming of age, to repudiate the purchase, and return the property to the vendor, and recover back whatever he may have paid or given in exchange.¹⁴

An infant may sell his real or personal property so as to transmit a voidable title, but may disaffirm the sale

¹¹ See Clark, Contracts (2d Ed.) 149-178; 16 Am. & Eng. Enc. Law (2d Ed.) 271-307; monographic note in 18 Am. St. Rep. 573. An infant husband is liable for the antenuptial debts of his wife. *Roach v. Quick*, 9 Wend. (N. Y.) 238, Woodruff Cas. 441. So, also, he is liable for necessities furnished to his wife and children. *Cantine v. Phillips*, 5 Har. (Del.) 428, Woodruff Cas. 395.

¹² It would be difficult to find direct authority for so undisputed a proposition, but the text is supported indirectly by innumerable cases involving the property rights of infants.

¹³ 16 Am. & Eng. Enc. Law (2d Ed.) 258-260; *Detrich v. Migatt*, 19 Ill. 146, 68 Am. Dec. 584; *Hall v. Hancock*, 15 Pick. (Mass.) 255, 26 Am. Dec. 598; *Harper v. Archer*, 4 Smedes & M. (Miss.) 99, 43 Am. Dec. 472, and note; *Marsellis v. Thalhimer*, 2 Paige (N. Y.) 35, 21 Am. Dec. 66.

¹⁴ 16 Am. & Eng. Enc. Law (2d Ed.) 290; note in 18 Am. St. Rep. 587, 597; *House v. Alexander*, 105 Ind. 189, 55 Am. Rep. 189; *Lynde v. Budd*, 2 Paige (N. Y.) 191, 21 Am. Dec. 84.

upon attaining his majority, and recover back the property.¹⁵ So, also, he may dispose of his property by gift, subject to a like power of repudiation.¹⁶ At common law, an infant may bequeath personal property at twelve years of age, if a female, and fourteen, if a male, if proved to have sufficient discretion.¹⁷ At present the age of testamentary capacity, as to both personalty and real property, is everywhere regulated by statute.¹⁸

§ 194. Same—Capacity to act as agent or fiduciary.

An infant, although not capable of acting for himself, may act as the agent of another who is *sui juris*. This is in accordance with the general rule that an agent need not possess the qualifications of his principal.¹⁹

An infant may be named as trustee in an instrument creating a trust, and the legal title will vest in him as trustee; but he is not capable of administering the trust, and hence a court of equity will never appoint an infant as trustee, and, if an infant is named as trustee in the trust instrument, the court will direct the execution of the trust by the infant or his guardian, or will remove the infant, and appoint in his place some one competent to act.²⁰ At common law, infancy did not disqualify a

¹⁵ 16 Am. & Eng. Enc. Law (2d Ed.) 282, 288; note in 18 Am. St. Rep. 582, 595; *Grace v. Hale*, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296; *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445.

¹⁶ Note in 18 Am. St. Rep. 628; *Slaughter v. Cunningham*, 24 Ala. 260, 60 Am. Dec. 463; *Person v. Chase*, 37 Vt. 647, 88 Am. Dec. 630.

¹⁷ 1 Bl. Comm. 463.

¹⁸ See *Rood*, Wills, §§ 106, 107; 16 Am. & Eng. Enc. Law (2d Ed.) 265.

¹⁹ 1 Am. & Eng. Enc. Law (2d Ed.) 945; *Talbot v. Bowen*, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747.

²⁰ *Perry*, Trusts, §§ 52-54.

person for the office of executor, but under modern statutes an infant is not competent to act as such.²¹ So, also, he cannot act as administrator.²²

Plainly an infant could not serve in any fiduciary position in which a bond is required, for he could not qualify by executing the required bond, unless made competent by statute.

§ 195. Same—Capacity to hold office.

An infant is not capable of holding an office requiring judgment, discretion, and experience, or involving pecuniary or public responsibility.²³ Thus, he cannot be a justice of the peace,²⁴ or constable,²⁵ or attorney at law,²⁶ or juror.²⁷ But infants are capable of holding such merely ministerial offices as call for the exercise of skill and diligence only, and do not concern the administration of justice; for example, the office of notary public.²⁸ So, also, an infant may be appointed a deputy

²¹ 11 Am. & Eng. Enc. Law (2d Ed.) 752.

²² 11 Am. & Eng. Enc. Law (2d Ed.) 780; *Saum v. Coffelt*, 79 Va. 510.

²³ See 16 Am. & Eng. Enc. Law (2d Ed.) 266. The age at which particular offices may be held, or particular public duties discharged, is in many cases prescribed by statute.

²⁴ *Golding's Petition*, 57 N. H. 146, 24 Am. Rep. 66.

²⁵ *Green v. Burke*, 23 Wend. (N. Y.) 490.

²⁶ 3 Am. & Eng. Enc. Law (2d Ed.) 285. Admission to the bar is regulated in all the states by statutes, which practically all provide that the applicant must be twenty-one years of age.

²⁷ 17 Am. & Eng. Enc. Law (2d Ed.) 1116; *Wassum v. Feeney*, 121 Mass. 93, 23 Am. Rep. 253; *Hite v. Com.*, 96 Va. 489, 31 S. E. 895.

²⁸ *U. S. v. Bixby*, 9 Fed. 78.

sheriff to perform the ministerial duty of serving process.²⁹

§ 196. Same—Capacity as witnesses.

An infant, however young, may be a witness, provided he is sufficiently intelligent to observe and recite facts correctly, and to understand the nature and obligation of an oath, but not if he lacks such intelligence. If he is over fourteen years of age, his competency will be presumed, but, under that age, competency is not presumed, but must be proved. The competency of the infant to testify is to be determined by the presiding judge, who may examinè him with reference to this question, and, in his discretion, instruct him as to the obligation of an oath. The amount of credit to be given to the infant's testimony is a question for the consideration of the jury.³⁰

§ 197. Criminal responsibility of infants.

At common law, an infant under seven years of age is conclusively deemed incapable of committing a crime. Between the ages of seven and fourteen he is presumed *prima facie* to be incapable; but this presumption may

²⁹ Moore v. Graves, 3 N. H. 408, Woodruff Cas. 437; Jamesville, etc., R. Co. v. Fisher, 109 N. C. 1, 13 S. E. 698. In some states it is provided by statute that infants above a specified age may serve process.

³⁰ 16 Am. & Eng. Enc. Law (2d Ed.) 267-271; Wheeler v. U. S., 159 U. S. 523, Woodruff Cas. 434; Carter v. State, 63 Ala. 52, 35 Am. Rep. 4; State v. Richie, 28 La. Ann. 327, 26 Am. Rep. 100; Com. v. Hutchinson, 10 Mass. 225; McGuire v. People, 44 Mich. 286, 38 Am. Rep. 265; Holst v. State, 23 Tex. App. 1, 59 Am. Rep. 770; Oliver v. Com., 77 Va. 590.

be rebutted, except in the case of rape, a boy under fourteen being conclusively presumed incapable of committing this offense. Above fourteen, an infant, like an adult, is *prima facie* capable of committing crime.³¹

§ 198. Liability of infants for torts.

In general, an infant is as liable for his torts as an adult, and, if he owns property in his own right, he can be compelled to respond in damages. In most cases, recovery for a tort is allowed as compensation for the injury to the plaintiff, and not in order to punish the defendant. Ordinarily, therefore, the defendant's motive or intent in inflicting the injury is immaterial, the sole inquiry being, was the plaintiff injured? It is possible that an injury inflicted by a very young child might be considered as the result of an accident, and hence be *damnum absque injuria*; but it seems that this could not be true in any case where the injury is committed by force. Where an infant is not of sufficient age or capacity to be chargeable with malice or negligence, it

³¹ 1 Bl. Comm. 464; 16 Am. & Eng. Enc. Law (2d Ed.) 311-316; notes in 70 Am. Dec. 496, and 36 L. R. A. 196; Martin v. State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844; Hill v. State, 63 Ga. 578, 36 Am. Rep. 120; State v. Tice, 90 Mo. 112, Woodruff Cas. 433, Clark Cr. Cas. 77, and note; State v. Yeargan, 117 N. C. 706, 23 S. E. 153, 36 L. R. A. 196; Carr v. State, 24 Tex. App. 562, 5 Am. St. Rep. 905; Law v. Com., 75 Va. 835, 40 Am. Rep. 750; Foster v. Com., 96 Va. 306, 31 S. E. 503, 42 L. R. A. 589. In several cases, infants below fourteen have been executed for murder. See 4 Bl. Comm. 23; Godfrey v. State, 31 Ala. 323, 70 Am. Dec. 494; State v. Guild, 10 N. Y. S. 163, 18 Am. Dec. 404. In several states, a boy under fourteen may be convicted of rape, if physically capable. Gordon v. State, 93 Ga. 531, 21 S. E. 54, 44 Am. St. Rep. 189; Heilman v. Com., 84 Ky. 457, 4 Am. St. Rep. 207; Wagoner v. State, 5 Lea (Tenn.) 352, 40 Am. Rep. 36.

seems that he cannot be held responsible for an alleged tort involving either of these elements. Subject to the suggested qualifications, an infant is liable for his torts;³² and the fact that he acted under the command of his parent or other person exercising authority over him is no defense.³³ But an infant is not, in general, liable for his torts which are connected with or grow out of contracts. If the wrong complained of is essentially a breach of contract, the infant cannot be made liable by suing him as for a tort; but if the wrong is essentially a tort, though growing out of or connected with a contract, the infant may be held liable, though sued as on contract. In such case it is the substance of the action, and not its form, that determines the infant's liability.³⁴ Thus, where an infant hires a chattel (e. g., a horse), and negligently injures it while using it for the purpose for which it was hired, the wrong may be regarded as either a tort or a breach of contract, but, being predominantly the latter, the infant cannot be held liable. But if the injury is willful and intentional, or while the chattel is being used for a different purpose from that for which it was hired, the predominant char-

³² Cooley, Torts, 103; 16 Am. & Eng. Enc. Law (2d Ed.) 307; notes in 33 Am. Dec. 179; *Peterson v. Hoffner*, 59 Ind. 130, 26 Am. Rep. 81; *Conway v. Reed*, 66 Mo. 346, 27 Am. Rep. 354; *Huchting v. Engel*, 17 Wis. 230, 84 Am. Dec. 741, *Woodruff Cas.* 412.

³³ *Scott v. Watson*, 46 Me. 362, 74 Am. Dec. 457; *Humphreys v. Douglass*, 10 Vt. 71, 33 Am. Dec. 177.

³⁴ *Clark*, Contracts (2d Ed.) 176; Cooley, Torts, 106; 16 Am. & Eng. Enc. Law (2d Ed.) 308; notes in 33 Am. Dec. 180, and 18 Am. St. Rep. 720; *Slayton v. Barry*, 175 Mass. 513, 56 N. E. 574, 78 Am. St. Rep. 510; *Lowery v. Cate*, 108 Tenn. 54, 64 S. W. 1068, 91 Am. St. Rep. 744.

acter of the wrong is tort, and the infant is liable.³⁵ So, also, an infant may be held liable in tort for his frauds or false representations in matters of contract.³⁶

§ 199. Recovery by infants for torts.

A child may recover, in a suit brought in his behalf, for an injury done to his person by the tortious act of another. Actions for such injuries are quite common, and, in general, are governed by the ordinary rules of law applicable to actions for damages for personal injuries.³⁷

As in the case of an action by an adult, the child's right of action may be defeated by his own contributory negligence, but an infant of tender years will not be held to so strict a rule as to what constitutes contributory negligence as a person of more mature age. He is bound to exercise that degree of care in avoiding injury, and that only, which may reasonably be expected of one of his age and capacity, and, if too young or immature to exercise judgment and discretion, he cannot be

³⁵ *Churchill v. White*, 58 Neb. 22, 78 N. W. 369, 76 Am. St. Rep. 64; *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189, *Woodruff Cas.* 414; *Campbell v. Stakes*, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561; *Freeman v. Boland*, 14 R. I. 39, 51 Am. Rep. 340; *Towne v. Wiley*, 23 Vt. 355, 56 Am. Dec. 85; *Ray v. Tubbs*, 50 Vt. 688, 28 Am. Rep. 519.

³⁶ *Clark*, *Contracts* (2d Ed.) 177; 16 Am. & Eng. Enc. Law (2d Ed.) 310; *Rice v. Boyer*, 108 Ind. 472, 55 Am. Rep. 53; *Word v. Vance*, 1 Nott & McC. (S. C.) 197, 9 Am. Dec. 683.

³⁷ *Hurst v. Goodwin*, 114 Ga. 585, 40 S. E. 764, 88 Am. St. Rep. 43; *Rogers v. Smith*, 17 Ind. 323, 79 Am. Dec. 483; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273; and cases cited in notes immediately following. As to damages in such actions, see *Western, etc., R. Co. v. Young*, 81 Ga. 397, 12 Am. St. Rep. 320,

charged with contributory negligence.³⁸ According to the weight of authority, the contributory negligence of the parent or other person having custody of the child will not be imputed to the child so as to defeat his right of action.³⁹ Some courts, however, hold that the contributory negligence of the parent is a good defense to an action by the child;⁴⁰ but even according to these authorities, the parent's negligence, to have this effect, must be a proximate cause of the injury. Thus, the negligence of a parent in permitting his child, too young to take proper care of itself, to go unattended into a dangerous place, as, for example, into a public street, will not preclude a recovery by the child for injuries there

Houston, etc., R. Co. v. Boozer, 70 Tex. 530, 8 Am. St. Rep. 615; Peppercorn v. Black River Falls, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818.

³⁸ 7 Am. & Eng. Enc. Law (2d Ed.) 405; notes in 81 Am. St. Rep. 878, and 14 Am. St. Rep. 590; Pratt Coal, etc., Co. v. Brawley, 83 Ala. 371, 3 Am. St. Rep. 751; Barnes v. Shreveport City R. Co., 47 La. Ann. 1218, 17 So. 782, 49 Am. St. Rep. 400; Westbrook v. Mobile, etc., R. Co., 66 Miss. 560, 6 So. 321, 14 Am. St. Rep. 587; Roanoke v. Shull, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791.

³⁹ 7 Am. & Eng. Enc. Law (2d Ed.) 450; notes in 14 Am. St. Rep. 590, and 44 Am. St. Rep. 180; Atlanta, etc., R. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550, 44 Am. St. Rep. 145; Wymore v. Mahaska County, 78 Iowa, 396, 43 N. W. 264, 16 Am. St. Rep. 449; Westbrook v. Mobile, etc., R. Co., 66 Miss. 560, 6 So. 321, 14 Am. St. Rep. 587; Erie City Passenger R. Co. v. Schuster, 113 Pa. 412, 57 A. R. 471; Western Union Tel. Co. v. Hoffman, 80 Tex. 420, 15 S. W. 1048, 26 Am. St. Rep. 759; Norfolk, etc., R. Co. v. Groseclose's Adm'r, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718; Roanoke v. Shull, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791.

⁴⁰ 7 Am. & Eng. Enc. Law (2d Ed.) 449; Casey v. Smith, 152 Mass. 294, 25 N. E. 734, 23 Am. St. Rep. 842; Grant v. Fitchburg, 160 Mass. 16, 35 N. E. 84, 39 Am. St. Rep. 449; Fitzgerald v. St. Paul, etc., R. Co., 29 Minn. 336, 43 Am. Rep. 212; Hartfield v. Roper, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273.

received through the negligence of another, if the child itself did nothing which would have constituted negligence in an adult. In such case the parent's original negligence in permitting the child to go unattended is too remote to be considered contributory.⁴¹

The fact that, at the time of the injury, the child was a trespasser on the defendant's premises, is no defense to an action by the child, where such premises were peculiarly attractive to children, offering a temptation to play thereon. In such case the owner of the premises must take pains to see that children attracted thereto are not injured while playing there.⁴²

§ 200. Suits by or against infants.

An infant cannot appear in person as plaintiff or defendant in a civil action. Where the infant is plaintiff, the suit is brought in his name by his "next friend" (*prochein ami*), who is usually the father or some other relative, and who conducts the suit. The next friend is personally liable for the costs. In some jurisdictions the infant sues by guardian. An infant defends a suit in his own name by his guardian *ad litem* appointed by the

⁴¹ *Lynch v. Smith*, 104 Mass. 52, 6 Am. Rep. 188; *Wiswell v. Doyle*, 160 Mass. 42, 35 N. E. 107, 39 Am. St. Rep. 451; *Winters v. Kansas City Cable R. Co.*, 99 Mo. 509, 12 S. W. 652, 17 Am. St. Rep. 591; *Ihl v. Forty-second Street, etc., R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450; *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67.

⁴² As to the defendant's liability where the child was a trespasser when injured, see 7 Am. & Eng. Enc. Law (2d Ed.) 403, and notes in 31 Am. Rep. 206, 40 Am. Rep. 667, 59 Am. Rep. 23, 14 Am. St. Rep. 595, and 49 Am. St. Rep. 416. The cases on the subject are not entirely harmonious.

court or judge for this purpose.⁴³ In a criminal prosecution, an infant appears and defends like an adult, by attorney or in person.⁴⁴

The subject of this section will be found fully discussed in works on pleading and procedure.

⁴³ See 10 Enc. Pl. & Pr. 583, and works on pleading and procedure.

⁴⁴ Word v. Com., 3 Leigh (Va.) 743.

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